76-11

IN THE

Supreme Court of the United States

October Term, 1975

No. .....

DAVID HALL,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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5. The district court refused to examine prospective jurors who had heard or read pretrial news accounts of the charges against petitioner, with particularity to elicit answers which would be a basis for objectively determining the impact, if any, of such news accounts on the jurors' impartiality. The district court was content to rely on the jurors' subjective responses to general questions, to the effect that they had not formed opinions as to petitioner's guilt in consequence of having read or heard such news accounts, and that they could put aside any information they had gotten from such news accounts, etc. Petitioner is a well known public figure in Oklahoma, and pretrial news accounts of the case were read or heard by all proposed jurors who were examined. The nature of the news accounts was such that 4, or possibly 5, of the approximately 31 jurors examined admitted that they had formed opinions as a result of reading or hearing them. In affirming, the court below decided an important question of federal law which has not been, but should be, settled by this Court 42

6. Petitioner and a witness against him called by the prosecutor had been charged by the Grand Jury as co-defendants in the conspiracy count —Count II—of the indictment. On direct examination of the witness, the prosecutor elicited that fact, and also the fact that prior to trial the witness had pleaded guilty to Count II. On his cross-examination of petitioner, the prosecutor dwelt at length on the plea of guilty of such witness, the circumstances surrounding it and its consequences to the wit-

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The petitioner, David Hall, defendant-appellant in the proceeding below, prays that a writ of certiorari issue to review the judgment therein of the United States Court of Appeals for the Tenth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, is set out at App. A, pp. 1a-35a, *infra*.[1] The orders of the United States District Court for the Western District of Oklahoma, dated and filed February 11, 1975, and April 24, 1975, are set out, respectively, at App. C, pp. 38a-63a and App. D, pp. 64a-74a, *infra*.

Jurisdiction

The judgment (order) of the United States Court of Appeals for the Tenth Circuit affirming the judgment of conviction of the United States District Court for the Western District of Oklahoma, App. F, p. 86a, *infra;* R. III-607, is dated and was entered May 12, 1976. Petitioner's timely petition for rehearing was denied by order of the United States Court of Appeals, dated and entered June 8, 1976. App. B, pp. 36a-37a, *infra*. The jurisdiction of the United States District Court for the Western District of Oklahoma was based on Tit. 18 U.S.C. §3231. The jurisdiction of this Court is invoked under Tit. 28 U.S.C. §1254(1).

Questions Presented

The questions presented for review are:

1. Whether the solicitation by a State officer of a payment for the performance of a service constitutes attempted extortion induced under color of official right with-

1. App. references are to appendices to this petition. R. references are to the volume (Roman numerals) and page (Arabic numerals) of the record in the court below.

in the meaning of the Hobbs Act, Tit. 18 U.S.C. §1951, *where* the service was not within the scope of his official duties and the payment was neither due to him, nor represented by him to be due to him, by law, for any official service.

2. Whether petitioner is denied his Fifth Amendment right not to be tried for felony except on the presentment or indictment of a grand jury, *where* in an indictment charging him with conspiracy to violate, and violating the Travel Act, Tit. 18 U.S.C. §1952, the grand jury charged that the "unlawful activity" comprised two offenses under State law, but, the district court, holding *sua sponte* that the averments of the second of such alleged offenses were surplusage, "out of an abundance of caution, fearful that this could be some measure of inconsistency", amended the indictment, in legal effect, by directing that the trial be conducted, and conducting it in all respects as though there were no such averments in the indictment.

3. Whether petitioner is denied his Sixth Amendment right to a trial by an impartial jury in the absence of a showing that the consideration of the case by a 65-year-old juror was not affected by drugs taken by, and/or administered to her when she became ill after the jury had been instructed and sequestered for the duration of its deliberations, and, further, by *ex parte* telephone communications by the trial judge with her physician, and through him with the juror, while she was hospitalized, *where* the trial judge told the juror's physician that he "would like to finish" the case "today", the juror thereupon returned to the jury's deliberations, and the jury

reached a verdict less than three hours later, notwithstanding its inability to reach a verdict in approximately a day and a half before she was taken ill.

4. Whether petitioner is denied his right under Rule 43(a) of the Federal Rules of Criminal Procedure to be present at every stage of the trial, by the *ex parte* communications of the trial judge with the juror's physician, and through him with the juror, mentioned in "3" above.

5. Whether petitioner is denied his Sixth Amendment right to trial by an impartial jury by the refusal of the district court to examine individually each perspective juror who admitted having read or heard pretrial news accounts of the charges against petitioner, with particularity to elicit answers which would be a basis for an objective determination of the effect thereof, if any, on such perspective juror's ability to be impartial, *where* petitioner is a public figure, such pretrial news accounts were extensive and all of the perspective jurors who were examined admitted to having read or heard such news accounts.

6. Whether petitioner is denied his Fifth Amendment right to a fair trial, *where* the fact that a witness against him was a co-defendant who had pleaded guilty is put in evidence by the prosecutor, petitioner is cross-examined at some length by the prosecutor with respect to such co-defendant's plea of guilty, and in his summation the prosecutor dwells on such co-defendant's plea of guilty, and the consequences of it to him, as assuring his veracity as a witness.

The Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the Fifth and Sixth Amendments, which are set out at App. E, p. 75a, *infra*.

The statutes involved are the Hobbs Act, Tit. 18 U.S.C. §1951 and the Travel Act, Tit. 18 U.S.C. §1952, which are set out at App. E, pp. 75a-77a, *infra*.

The rules involved are Rules 7 and 43 of the Federal Rules of Criminal Procedure, which are set out at App. E, pp. 78a-81a, *infra*.

Also involved are §§850-859 of the New York Penal Law of 1909, which are set out at App. E, pp. 81a-85a, *infra*.

Statement of the Case

In a six-count indictment filed January 16, 1975, R. I-1, the Grand Jury of the United States for the Western District of Oklahoma charged petitioner in Count I, R. I-1, with violating the Hobbs Act, Tit. 18 U.S.C. §1951; charged the petitioner and others in Count II, R. I-3, with conspiracy to violate the Travel Act, Tit. 18 U.S.C. §1952; charged petitioner in each of Counts III and IV, R. I-6, 7, with a violation of the Travel Act, Tit. 18 U.S.C. §1952; and in Counts V and VI, R. I-7, 8, charged others than petitioner with two violations of the Travel Act, Tit. 18 U.S.C. §1952. Petitioner pleaded not guilty, the case was tried to a jury,

and petitioner was found guilty on all Counts, as charged. The district court denied petitioner's post-verdict motions for judgment notwithstanding the verdict or, alternatively, for a new trial, and the Court of Appeals affirmed the judgment of conviction. App. C, pp. 38a-63a; App. A, pp. 1a-35a, *infra*.

The gist of the alleged factual background of all four charges against petitioner is that, when he was Governor of Oklahoma, he solicited money from a corporation and/or persons connected with it, to exert influence on the Board of Trustees of Oklahoma's public employees' retirement system to invest funds of the system with such corporation. Petitioner was not a member of such Board of Trustees, and participation in its investment decisions was not within the scope of his official duties.

This is the framework on which Count I charges petitioner with attempted extortion "under color of official right", in violation of the Hobbs Act; Count II charges him with participation in a conspiracy to violate the Travel Act by promoting a scheme to bribe a public officer or public officers of the State of Oklahoma, and to accept a bribe, in violation of Oklahoma law; and Counts III and IV each charge him with the promotion of a scheme, in violation of the Travel Act, to bribe one Rogers, a public officer of the State of Oklahoma, and to accept a bribe himself, in violation of Oklahoma law.

The facts pertinent to the three disparate aspects of the case with which this petition is concerned, are set out in the discussion which follows.

Reasons for Granting the Writ

1. *In indicting petitioner for violating the Hobbs Act, Tit. 18 U.S.C. §1951, the Grand Jury charged that he solicited money "under color of official right" to influence an investment decision of the Board of Trustees of the Oklahoma public employees' retirement system. Petitioner was not a member of such Board, and participation in its investment decisions was not within the scope of his official duties. In nevertheless affirming petitioner's conviction, the court below decided an important question of federal law which has not been, but should be, settled by this Court.*

In charging petitioner with a violation of the Hobbs Act, the Grand Jury charged, R. I-1, 2, 3, that petitioner, when Governor of Oklahoma, attempted to obtain money from a corporation and/or persons connected with it

> induced under color of official right, that is to say to obtain money by virtue of the defendant's [*i.e.*, petitioner's] position as Governor of Oklahoma, in that the defendant used the power, influence, prerogatives and prestige of his office to influence

the Board of Trustees of the public employees' retirement system to make an investment with such corporation. It affirmatively appears from the indictment that petitioner was not a member of the Board, and there is no allegation, nor has the prosecution contended (as, indeed, it could not) that superintendence over the Board in the conduct of its affairs generally or that participation in its decisions concerning the investment of the system's funds was, by virtue of his being Governor, or otherwise, within the scope of

petitioner's official duties. Nor, is there any allegation, or claim by the prosecution (as, indeed, there could not be) that the money alleged to be involved was, or was represented by him as being payable to him by law for any service within the scope of his official duties.

The district court overruled petitioner's motion to dismiss Count I for failure to state an offense. R. I-50-62; II-253.

Further, the district court instructed the jury, R. XII-2272, that

> under color of right * * * means an attempt by an accused by virtue of his official position to obtain or induce the payment of money from another, with his consent, which was not due the accused or his office.

The district court overruled petitioner's objection to this instruction, and his request that the jury be instructed that "under color of right" requires a claim by the accused to the payment allegedly demanded, "under some semblance of right * * * because of being an officer," in other words, that "he had some official right to it." R. XII-2314-3318;[2] 2324.

In affirming, the court below said, App. A, p. 13a, *infra*,

> At bar we have the governor of a state dealing with a board with which he not only purports to have influence but indeed has influence. He exploited the belief in the victim in order to obtain payments. In doing so he induced payment "under color of official right."

2. The pages of the record numbered 3315-3323, appear to be misnumbered, and properly to be pages 2315-2323.

But, the legislative history of the Hobbs Act permits no conclusion other than that "extortion * * * under color of official right" as used in that Act does not encompass obtaining money by a public officer for a service not within the scope of his official duties. 91 Cong. Rec. 11839-11848, 11899-11922 (1945). The Hobbs Act's definitions of "extortion" and "robbery" were taken from the New York Penal Law and for that reason New York law has particular pertinence in their interpretation. *United States* v. *Nedley,* 255 F.2d 350, 355 (3d Cir. 1958).

Thus, in the debate on the bill which became the Act, Representative Hobbs, who sponsored it, said "there is nothing clearer than the definition of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code substantially." 91 Cong. Rec. 11900 (1945). And Representative Michener, in supporting the bill, said that "there has been and will be so much talk about what constituted robbery and extortion and it is well to remember that the New York definitions are being used in this bill." 91 Cong. Rec. 11843 (1945). See also, statements of Representative Walter and Representative Russell at 91 Cong. Rec. 11842, 11914 (1945); *United States* v. *Nedley, supra,* 255 F.2d at 355.

The definition of "extortion" in the Hobbs Act is:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The definition of "extortion" in §850 of the New York Penal Law of 1909, as amended and in effect in the period 1917-1967, was:

> Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right.

This definition was implemented and applied, in respect of the commission of extortion by "force or fear" by §§851, 852, 853 and 857, and in respect of the commission of extortion "under color of official right" by §855, which provided:

> A public officer who asks, or receives, or agrees to receive, a fee or other compensation *for his official service*:
>
> 1. In excess of the fee or compensation allowed to him by statute therefor; or,
>
> 2. Where no fee or compensation is allowed to him by statute therefor,
>
> Commits extortion and is guilty of a misdemeanor. [Emphasis supplied][3]

Thus, in New York law, from which the Hobbs Act's definition of extortion "under color of official right" was taken, an essential element of the crime was that the payment induced by the public officer be as a fee or other compensation "for his official service", *i.e.*, for action within the scope of his official duties. See, *People* v. *Samuels*, 188 Misc. 607, 71 N.Y. Supp. 2d 562 (1946). This, clearly, is what the phrase "under color of official right" imports.

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3. §854 made it the crime of "oppression" where a public officer or a person pretending to be such, unlawfully and maliciously, under pretense or color of official authority arrests or otherwise detains another against his will, seizes or levies upon another's property, dispossesses another of any real property or does any other act whereby another is injured in his person, property or rights.

For, the offense lies in the inducement of a payment "under color of *official* right" to it, and there can be no *official* right to the payment, colorable or otherwise, unless the act for which the public officer seeks to induce it, is within the scope of his official duties.

Moreover, in implementing so much of the definition in §850 as relates to extortion "under color of official right", §855 tracks the common law, under which a public officer committed extortion *only* when he induced the payment of compensation not lawfully due him, for a service within the scope of his official duties. Thus, in the succinct statement of the common law in the court's notes to *Commonwealth* v. *Mitchell,* 3 Bush 25, 96 Am. Dec. 192 (Ky. 1867), as quoted with approval in *La Tour* v. *Stone,* 139 Fla. 681, 693, 190 So. 704, 709 (1939), it is said in pertinent part:

> * * * In a general sense extortion signifies any oppression under color of right; but technically it is the corrupt demanding and receiving by an officer, by color of his office, of money or other thing of value, that is not due at all, or more than is due, or before it is due [citations omitted] * * *.
>
> * * *
>
> * * * A taking under color of office is of the essence of the offense. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority [citations omitted]. Therefore, it is not extortion if an officer receives a compensation or fee for services which are not his official duty to perform [citations omitted].

The court below would enlarge the crime of "extortion * * * under color of official right" to the inducement of a

payment by a public officer for a service outside the scope of his official duties, to which payment, perforce, he has no "color of official right". But, in *Morissette* v. *United States,* 342 U.S. 246, 263 (1952), this Court said:

> The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly * * * admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

There is, however, in recent decisions of the courts of appeals under the Hobbs Act, a discernible trend away from the salutary restraints of *Morissette,* toward what may be called creative innovation, and to expand, wholly without statutory warrant, the limits of extortion far beyond those known in the body of law from which the Hobbs Act definition was expressly taken. The case at bar is typical of such decisions.

The trend is new. Thus, in 1958 the 3d Circuit properly reversed a conviction for violation of the Hobbs Act because the district court had expanded robbery, beyond its historic limits, to include interference with dominion not involving a taking. *United States* v. *Nedley,* 255 F.2d 350,

353-358. Yet, in 1974, the 7th Circuit said in *United States* v. *Braasch*, 505 F.2d 139, 151, a case on which the court below relies, App. A, pp. 11a-12a, *infra*, that for the purposes of extortion "under color of official right" under the Hobbs Act:

> It matters not whether the public official induces payment to perform his duties or not to perform his duties, or even, as here, to perform or not perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for payment focuses on the recipient's office, the conduct falls within 18 U.S.C. §1951.

This is nothing less than the judicial creation of a new crime, wholly unknown in New York law, from which the Hobbs Act concept of extortion "under color of official right" was taken, and in the common law, from which New York, in turn, took the concept. See also, *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), which the court below strangely considered "a case closely similar to the one before us," App. A, p. 13a, *infra*, where the court paid lip-service to the limits of the crime under common law, but quoted with approval the passage quoted above from *Braasch*.[4] Again, in *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir. 1975), on which the court below also relies, App. A, pp. 12a, 13a, *infra*, a Hobbs Act conviction for "extortion * * * under color of official right" was affirmed although

4. In *Trotta*, a town commissioner of public works, whose official duties included letting, and supervising performance under public works contracts, induced a town contractor to make a political contribution, the plain, if unspoken, implication being that his failure to make such contribution would adversely affect his obtaining other contracts. Thus, *Trotta* has no similarity to the case at bar. *Trotta*, moreover, seems clearly to fit into the classic mold, and there was no need there to rely on *Braasch*.

the court which decided *Nedley* in 1958, forthrightly acknowledged, 521 F.2d at 643, that it was "clear, of course," that the service involved was not within the scope of the defendant's official duties. That seems also to have been the decision in *United States* v. *Stasczuk*, 502 F.2d 875 (7th Cir. 1974).[5]

Without speculating why this Court denied petitions for certiorari in all of these cases,[6] it may be observed that, in consequence, a body of law has been developed by the Courts of Appeals, which is in defiance of the principle announced by this Court in *Morissette*, and has no root in the statutory language or the congressional intent. If the teaching of this Court in *Morissette* still has validity, the process whereby the Courts of Appeals have in effect created a new crime by enlarging the reach of extortion "under color of official right", as enacted in the Hobbs Act, should be stayed, and rolled back, lest they be encouraged further to exercise judicial power to expand the scope of federal criminal law beyond its statutory content. This Court has not addressed itself to the question whether extortion "under color of official right", as used in the Hobbs Act, requires that the service for which payment is induced, be within the scope of the defendant's official duties, as did both the New York law from which the Hobbs Act's concept of the offense was taken, and the common law, from which

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5. In *United States* v. *Crowley*, 504 F.2d 992 (7th Cir. 1974), and *United States* v. *Irali*, 503 F.2d 1295 (7th Cir. 1974), *cert. denied* 420 U.S. 990, also cited by the court below in support of its affirmance, App. A, p. 12a, *infra*, the act for which the defendants took compensation came within the scope of their official duties.

6. *Braasch* at 421 U.S. 910; *Stasczuk* at —— U.S. ——, 96 S. Ct. 65; *Mazzei* at —— U.S. ——, 96 S. Ct. 446; and *Trotta* at —— U.S. ——, 44 U.S.L.W. 3659.

the New York law derived.[7] This is an important question of federal law because it involves the interpretation of a crucial aspect of an important federal penal statute of wide application.

In affirming petitioner's conviction under Count I, the court below has decided an important question of federal law which has not been, but should be, settled by this Court.

2. *In indicting petitioner for conspiracy to violate, and violating the Travel Act, Tit. 18 U.S.C. §1952, the Grand Jury charged that the "unlawful activity" comprised separate offenses against two provisions of Oklahoma law. By directing that the trial be conducted, and conducting it as though the averments of the second alleged offense were not in the indictment, the district court in legal effect amended the indictment. In nevertheless affirming petitioner's conviction, the court below decided a federal question in a way in conflict with applicable decisions of this Court.*

In the Travel Act conspiracy charge against petitioner and others, the Grand Jury charged, R. I-4, that the "un-

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7. In *United States* v. *Nardello*, 393 U.S. 286 (1969), this Court had under consideration whether extortion in violation of State law within the meaning of the Travel Act, Tit. 18 U.S.C. §1952, included only offenses classified by State law as "extortion" or extended to other extortionate crimes under State law, but called by some other name, as, for example, "blackmail". In passing, this Court said, 393 U.S. at 289:

> At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion.

But this Court expressed no view as to what constitutes "under color of office," which is, in effect, the question here.

lawful activity'' under the Travel Act was, in pertinent part:

> a scheme to bribe a public officer or public officers of the State of Oklahoma * * * in violation of Section 381, Title 21, Oklahoma Statutes *and to accept such a bribe in violation of Section 382, Title 21, Oklahoma Statutes* * * *. [Emphasis supplied]

Similarly, in charging petitioner with violations of the Travel Act, the Grand Jury charged, R. I-6, 7, that the ''unlawful activity'' under the Travel Act was, in pertinent part:

> to bribe John Rogers, a public officer of the State of Oklahoma * * * in violation of Section 391, Title 21, Oklahoma Statutes, *and to accept a bribe himself in violation of Section 382, Title 21, Oklahoma Statutes* * * *. [Emphasis supplied]

After the jury had been impaneled, but before it was sworn, the district court summoned counsel to the bench and, among other things, stated, R. VIII-165, 167, 168:

> * * * You probably have already noted that in my explanation of the case to the jury, that I made no mention of those parts of the Indictment that refer to the acceptance of a bribe. If you Gentlemen will recall my order on the motions to dismiss, I have considered that as a surplusage and do not intend to instruct on it. I tell you this now so that you may conduct yourselves that way with reference to your opening statements and with reference to the presentation of evidence. I consider this matter of surplusage and I, out of an abundance of caution, fearful that this could be some measure of inconsistency * * * as to Hall, so out of an abundance of caution, and since the Counts involved with this, treated as surplusage, still set forth alleged viola-

> tions of the Statute, I have decided to precede [*sic*] this way in this case.

On the contrary, however, in his order denying petitioner's motions to dismiss, the district court did *not* hold or consider the averments in question to be surplusage. R. II-253. While petitioner had contended in support of his motion that such averments were insufficient to charge an offense under Oklahoma law, the District Court was most careful *not* to decide that question. Thus, in his order denying the motions to dismiss, the district court said in pertinent part, App. D, pp. 71a-72a, *infra;* R. II-258, 259:

> The unlawful activity alleged in these counts [*i.e.*, counts II, III and IV] is twofold: the bribery of John Rogers in violation of 21 O.S. §381 and acceptance of a bribe by David Hall in violation of 21 O.S. §382. The defendant Hall's argument * * * maintains that allegations concerning acceptance of a bribe by Hall are insufficient to show a violation of Oklahoma law * * *. *Assuming arguendo the insufficiency of the allegations to establish the unlawful activity consisting of accepting a bribe,* such defect is not fatal to the indictment. The allegations concerning the attempt to bribe Rogers are sufficient to establish the necessary unlawful activity. * * *
>
> The validity of the Indictment is not affected by the fact that the pleader *may* have mistakenly stated the acts alleged to be a violation of both 21 O.S. §§381 and 382. * * * [Emphasis supplied]

Without further ado, the district court then went on to cite and quote from *Ford* v. *United States,* 273 U.S. 593, 602 (1927), and *United States* v. *Strauss,* 283 F.2d 155 (5th Cir. 1960). In *Ford* it was said in respect of an averment in a conspiracy indictment that the defendants conspired

inter alia to violate a treaty—on its face, *not* an offense—that "a useless averment is innocuous and may be ignored". In *Strauss* it was held that a one-count indictment charging a conspiracy to violate two statutes was not subject to dismissal where the allegations in regard to one, but not to the other were insufficient.

But, in overruling petitioner's motions to dismiss, App. D, pp. 64a-74a, *infra,* the district court did *not* hold that "those parts of the indictment that refer to the acceptance of a bribe" by petitioner, R. VIII-167, were surplusage. And, it is clear from the District Court's above quoted statement at the Bench, R. VIII-167, 168, that it was *not* because such averments were, "useless" and "innocuous", as in *Ford,* or insufficiently pleaded as in *Strauss,* that he held them to be surplus. Rather, it was because he was

> * * * out of an abundance of caution, fearful that this could be of some measure of inconsistency * * * as to Hall, so out of an abundance of caution, and since the Counts involved with this, treated as surplusage, still set forth alleged violations of the statute * * *

that the District Court decided to eliminate them for the purposes of the trial. In short, the District Court sought to cure the indictment of a possible defect, which "could" be troublesome to the prosecution, by amending it, in legal effect. See, *e.g., Gaither* v. *United States,* 413 F.2d 1061, 1071 (D.C. Cir. 1969).

Petitioner's objection to such action was overruled, R. VIII-179, and the trial proceeded as though "those parts of the Indictment that refer to the acceptance of a bribe" by petitioner, had been stricken from it. Thus, in reciting the

indictment to the jury in his instructions to them, the District Court omitted all reference to them. R. XII-2259, 2266.

In affirming, the court below recognized, App. A, pp. 8a-11a, *infra,* that what was involved was an amendment of the indictment, but gave lip-service, and nothing more, to this Court's controlling decision in *Ex parte Bain,* 121 U.S. 1 (1887) and *Stirone* v. *United States,* 361 U.S. 212 (1960), that the Fifth Amendment forbids any such amendment of an indictment. Moreover, notwithstanding this Court's express reaffirmance of *Bain* in *Stirone,* 361 U.S. at 215, 216, the court below saw in *Stirone* some weakening of *Bain,* saying that, App. A, p. 9a, *infra, Stirone*

> held that the trial court was powerless to enlarge upon charges contained in the Grand Jury indictment. It did not, however, rule that a court was unable to *withdraw* charges and thus narrow the defendant's liability. [Emphasis by the court]

But since *Stirone* did *not* involve the "withdrawal of charges made in an indictment, there was no need for any "ruling" in that connection. Nevertheless, the court below strangely failed to observe that this Court made it plain in *Stirone* that in reaffirming *Bain* and its teaching, it was reaffirming that the Fifth Amendment barred judicial excision of charges from an indictment, as well as additions thereto. Thus, in *Stirone,* this Court said, 361 U.S. 215, 216:

> Ever since Ex parte Bain, 121 U.S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In that case, the court ordered that some specific and relevant allegations the grand jury had charged be

stricken from the indictment so that Bain might be convicted without proof of those particular allegations.[2] In holding that this could not be done, Mr. Justice Miller, speaking for the Court said:

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." 121 U.S. 1, 10.

2. Bain was indicted for making a false statement "with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association . . . ." After sustaining demurrers of Bain to the indictment, the trial court went on to say that "thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words *'the Comptroller of the Currency and'* therein contained." By this amendment it was intended to permit conviction of Bain without proof that he had deceived the Comptroller as the grand jury had charged.

So, too, in the case at Bar.

And, footnote 2 to *Stirone,* and the text that precedes it, quoted above, are the short answer to the conclusion of the court below, in affirming, that there was "no prejudice to Hall" in the District Court's action because "it reduced the charges against Hall". App. A, p. 11a, *infra.*

Moreover, apart from correcting matters of form, typographical errors, and the like, the amendment of an indictment other than by the grand jury, deprives the accused of his Fifth Amendment right not be tried for felony ex-

cept on the indictment of a grand jury, and because *Bain* "apparently excludes any notion of a non-prejudicial amendment * * *, the concept of harmless error has not been applied to amendments" of indictments. *Gaither* v. *United States*, 413 F.2d 1061, 1072 (D.C. Cir. 1969). The court there found confirmation of this in *Stirone* in that the variance which this Court found "substantial enough to amount to a constructive amendment" was condemned not because it "deprived the defendant of notice or protection against double jeopardy, but rather that it infringed on his 'right to have the grand jury make the charge on its own judgment' ". 413 F.2d at 1072. Indeed, in *Stirone* this Court said, 361 U.S. at 217:

> While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

The court below also relies on Rule 7(d), *F.R.Crim.P.*, as having somehow made *Bain* "less absolute". App. A, p. 10a, *infra*. But Rule 7(d) expressly provides that "The Court *on motion of the defendant* may strike surplusage from the indictment * * *" [emphasis supplied] and, of it, the Advisory Committee on Rules has, in a Note to it, authoritatively stated:

> This rule introduces a means of protecting the defendant against immaterial as irrelevant allegations in an indictment * * *, which may, however be prejudicial. *The authority of the Court to strike such surplusage is to be limited to doing so on defendant's motion, in*

> *the light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended.* Ex parte Bain, 121 U.S. 1. By making such a motion, the defendant would, however, waive his rights in this respect. [Emphasis supplied]

But, it may be noted that in *Crosby* v. *United States,* 359 F.2d 743, 745 (D.C. Cir. 1964), the court said that a judicial amendment to a grand jury indictment "cannot be accomplished even with a defendant's consent. The Supreme Court has ruled that the Fifth Amendment's guarantee may not be so undermined."

In reaffirming *Bain* once again, this Court said in *Russell* v. *United States,* 369 U.S. 749, 770 (1962), that the

> * * * settled rule in the federal courts [is] that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. *Ex parte Bain,* 121 U.S. 1; *United States* v. *Norris,* 281 U.S. 619; *Stirone* v. *United States,* 361 U.S. 212.

The court below relies also on *Salinger* v. *United States,* 272 U.S. 542 (1926) and other cases holding that at the close of a trial, the court may withdraw from the jury's consideration such part or parts of the charges in an indictment as are without support in the evidence. App. A, p. 10a, *infra.* But, as this Court said in *Salinger,* 272 U.S. at 548:

> The contention [is] that the court by withdrawing from the jury a part of the charge as without support in the evidence, amended the indictment * * *. The indictment was not amended either actually or in legal effect. It remained just as it was returned by the

> grand jury, and the trial was on the charge preferred in it and not on a modified charge.

This Court then went on to say, 272 U.S. at 549, that withdrawing charges from the jury for want of support in the evidence, does

> not work an amendment of the indictment and * * * [is] not even remotely an infraction of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

Bain's pertinence here rests not only in the principle it enunciates, but in its enunciation of that principle in circumstances almost identical with those here presented. There, the indictment charged that the accused filed a false report "with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs" of a certain banking association. The trial court amended the indictment by eliminating the words "the Comptroller of the Currency". In *Bain,* this Court said, 121 U.S. at 9, 10:

> The learned judge who presided in the circuit court at the time the change was made in this indictment, says that the court allowed the words, "Comptroller of the Currency and," to be stricken out as surplusage * * *. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests on the validity of the court's action in permitting the change in the indictment upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such a change to be made. He goes on to argue that the grand jury would have found

> the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive * * *. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else?

The impact of the foregoing on the case at bar needs no elaboration.

In affirming petitioner's conviction under Counts II, III and IV, the court below decided a federal question in a way in conflict with applicable decisions of this Court. *Ex parte Bain,* 121 U.S. 1 (1887); *Stirone* v. *United States,* 361 U.S. 212 (1960); *Russell* v. *United States,* 369 U.S. 749 (1962).

3. *The ingestion by a 65-year-old juror of drugs comprising tranquilizers and pain-killers, and ex parte telephone communications by the trial judge with her physician, and through him with the juror, while she was hospitalized, in which the trial judge told the physician that he*

"would like to finish" the case "today", are, in the circumstances of the case, matters which could influence the juror's consideration of the case, and in the absence of a showing that they did not, it is to be presumed that they did, thus denying petitioner his Sixth Amendment right to trial by an impartial jury. There was no such showing, and, in addition, in affirming petitioner's conviction, the court below has so far sanctioned a departure by the district court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The jury was instructed and sequestered for the duration of its deliberations before lunch on March 12, 1975. R. XII-2327-2333. The following day, at 4:30 in the afternoon, the district court advised counsel that he had a message from the jury, R. XII-2345, 2346,

> they would like to knock off at 4:30 today. Apparently they hadn't reached a verdict. One of the jurors is not feeling well and she does have a doctor which can be gotten to her, either by taking her there or causing the doctor to come to the hospital; under this early layoff, this would be possible. * * *

There was no objection, and the jury was recessed for the day. R. XII-2347-2349.

Although the record does not show it, but see, App. C, p. 54a, *infra*, sometime early the next morning, March 14, 1975, the trial judge must have advised counsel that the juror had been taken to the hospital, for at 11:30 that morning there was a proceeding in chambers at which certain documents were marked and admitted in evidence as

Court's Exhibits 5, 6 and 7[8] at the request of petitioner's attorney, who thereupon moved for a mistrial, on the grounds, *inter alia,* R. XII-2350, 2351:

> * * * that a juror who was, in fact, even apprehensive of possible heart attack or heart problems or chest pains relating to the heart would be more reluctant to engage in arguments and engage and express her opinions to the other jurors strongly and would be reluctant to engage in conflicting discussions and arguments with other jurors. On the further grounds that a juror who is, in fact, under medication may be not possessed, in fact, their full facilities so as to freely exercise their own good judgment and good common sense in order to arrive at a verdict in this cause and to participate in deliberations of the Jury. And on the further grounds that to proceed with this Juror, for the grounds previously stated here above, would be a violation of the Defendant's right to due process of law and violation of his Fifth and Sixth * * * [Amendment] Rights * * *.

Petitioner's attorney then requested the court to continue the proceeding to 1:30 that day so that he could subpoena the physicians who examined and treated the juror, to testify in connection with his motion, R. XII-2352,

> * * * inasmuch as I don't know what drug or drugs, if any—well, I presume there are some, but I don't

8. The judge described the exhibits as follows, R. XII-2350:

> * * * Court's Exhibit Five * * * [is] the report of the nurse who saw Juror Meyer yesterday; and Court's Exhibit Six is a report from the St. Anthony Hospital and a doctor there who received Juror Meyer in the Emergency Room at 5:25 this morning. Court's Exhibit Seven is a narrative report from the bailiffs about this incident, under date of March 14, 1975. It is not signed, Gentlemen, but I think it's the report, says, "The writer and Mrs. JoAnn Merck;" Mrs. JoAnn Merck is a female bailiff. I don't know who the writer is; if its important to you, it can be ascertained and we will add it at the bottom.

See, Supplemental Record, Volume 1.

> know what they are, or prescription of medicine she is now under or has been given prior to this time, or the length of time that such prescriptions or drugs would affect her * * *.

Thereupon, following negative responses to his inquiries whether petitioner would proceed without the juror, and whether petitioner had "any other evidence to present * * * now in support of your motion," R. XII-2353, 2354, the trial judge said:

> Now, I think I should state in the record that I have received Court's Exhibits Five, Six and Seven; and outside of that, *all I know is that Doctor Sanbar, about 10:30 or a quarter of 11:00, called me on the telephone, said that Mrs. Meyer had not suffered a myocardial infarction, or a heart attack, that she had some arthritic pains in one of her knees and that she's had some pains in her chest and that he examined her, administered to her, and that in his professional opinion she would be ready to resume her duties as a juror in this case at 1:30 today, releasing her from the hospital for this purpose.* And on this professional information, the motion will be overruled, mistrial will not be declared. The Jury will resume, all 12, at 1:30. [Emphasis supplied][9]

The court's telephone conversation with Dr. Sanbar was wholly *ex parte,* without prior notice to petitioner, and without petitioner or his attorney being present. But, notwithstanding the denial of his motion for a mistrial, peti-

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9. Following this denial of petitioner's motion for a mistrial, the District Court strongly urged counsel to agree to proceed with eleven jurors, and was highly critical of their unwillingness to do so. R. VIII-2355, 2356. This undoubtedly reflected his anxiety to "finish" the case "today", expressed in his *ex parte* telephone conversation with the juror's physician earlier that morning. See p. 28, *infra*.

tioner subpoenaed the physicians to appear in chambers, moved, at about 2:40 in the afternoon, for reconsideration of his motion, and to present the testimony of the physicians in support thereof. The juror was summoned to chambers from the jury deliberation room (to which she had been returned at about 1:30) and signed waivers of her physician-patient privilege. R. XII-2356-2363. On examination by the judge, Dr. Sanbar testified with respect to the telephone conversation between himself and the judge, as follows, R. XII-2407-2409:

> The Court: And some time around eleven o'clock, did you call me and tell me that it was appropriate for her to resume her duties as a juror in this case at 1:30 today?
>
> The Witness: *No, sir. I told you that I believed that she should stay until tomorrow and stay in the hospital. Then you advised me that you would like to proceed with the case and that you would like to finish it today and is it possible to get her back. And I told you I would go back and talk to the patient and see if she's up to it, and you remained on the telephone—*
>
> The Court: Did you do that?
>
> The Witness: *And I went back in and talked to the patient and asked her if she felt well enough to leave the hospital on her own and go back and resume her normal activities. And I returned to the telephone and told you that the patient feels up to going back to resuming her work. That's what I said.*
>
> The Court: Well, did you also tell me that it would be appropriate for her to do that?
>
> The Witness: I said that in my opinion she was—she did not have a heart attack and that I felt that she could leave the hospital. But I repeat, my first advice was to keep her until tomorrow morning for observation.

The Court: But then when I suggested that we could resume maybe at 1:30, did you go back and hold me on the phone while you made a further whatever you did?

* * *

The Witness: I went back and talked to the patient in front of the Deputy.

The Court: Then what did you come back and tell me?

The Witness: I told you that the patient felt well enough, according to her, to return and resume deliberations.

* * *

The Court: *Did you authorize her release today to come back and go to work at 1:30 as a juror?*

The Witness: *I only discharged her from the hospital.* [Emphasis supplied]

It further appeared from Dr. Sanbar's testimony that morning he had directed that she take one Motrin 400—"a medicine for arthritis pain"—four times a day, and that at his direction she had been given 5 milligrams of Valium—a tranquilizer—at noon, an hour and a half before she was returned to the jury deliberation room. R. XII-2390, 2399-2401. Notwithstanding Dr. Sanbar's testimony concerning the telephone conversation between the judge and himself, the former, in again denying petitioner's motion for a mistrial, said, R. XII-2419-2420:

* * * I asked him specifically his judgment about whether we could resume at 1:30 today. He said, "just a moment. I would like to go back and look at her again;" the way I understood it, words to that effect. He came back and said it was alright to resume at 1:30 today. * * * I would not have put her back to work without medical approval of this. This I had from this

> doctor. He did discharge her as of Noon today. He told me that she did not have a heart attack. I didn't know about the Valium until today, until this hearing; he didn't tell me that he had prescribed it or that she was going to take it. * * *

Notwithstanding Dr. Sanbar's testimony, uncontradicted of record, the trial judge repeated again, in denying petitioner's post-verdict motions, that he reconvened the jury for further deliberations with the "approval" and on the "advice" of Dr. Sanbar. App. C, pp. 43a, 44a, *infra.*

Thus, the trial judge determined in his own favor the issue of credibility as between Dr. Sanbar and himself as to what Dr. Sanbar said during their *ex parte* telephone conversation. And in affirming petitioner's conviction, the court below said, App. A, p. 18a, *infra.*

> Although * * * [Dr. Sanbar] recommended overnight hospitalization, he did not insist upon it and was governed by her own estimation of her physical condition. Given the fact that she was able to leave on March 14, there was an inference that the doctor was willing to discharge her *for the purpose of jury duty.* The difference between his account and that which the judge reported is insignificant. [Emphasis supplied]

But in direct response to the judge's inquiry of Dr. Sanbar whether he authorized "her release today *to come back and go to work at 1:30 as a juror*", Dr. Sanbar replied, as set out above, p. 29, *supra;* R. XII-2409:

> I *only* discharged her from the hospital. [Emphasis supplied]

Certainly, such testimony does not permit the inference, supportive of the trial judge's version of what Dr. Sanbar said in their *ex parte* telephone conversation, which the court below would construct.

As Dr. Sanbar was being excused, and just prior to the district court's second denial of petitioner's motion for a mistrial, the court announced that "the jury reports they have a verdict." R. XII-2417. Thus, petitioner's motion for a mistrial alone stood in the way of the judge's desire, expressed to Dr. Sanbar in their *ex parte* telephone conversation, as set out above, "to finish" the case "today." R. XII-2408.

But, for whatever reason, the trial judge, in denying the motion for a mistrial, and the court below, in affirming, brushed aside the testimony of both Dr. Richtner, the hospital resident, and Dr. Sanbar, her personal physician, R. XII-2419, 2420; App. A, pp. 16a-19a, *infra,* from which appeared that:

The juror was a 65-year-old woman with a history of high blood pressure, "pain in her chest relating to her heart," *i.e.,* angina, for which she had been hospitalized, and arthritis. At about six o'clock the evening of March 13, the day the jury's deliberations were recessed early because she "was not feeling well," a bailiff called Dr. Sanbar and the juror, getting on the telephone, told him that she had "pain in her left chest and was nervous." She had with her some Dalmane, a sleep inducer and some Valium, a tranquilizer. Dr. Sanbar told her to take two Valium tablets, that if she was still nervous at nine o'clock to take

another and a Dalmane, and that if she were not asleep by eleven, to take another Dalmane. R. XII-2371, 2386-2391.

At about five-thirty the morning of March 14, two bailiffs brought her to the emergency room of a hospital, complaining of chest pain. R. XII-2350, 2367. Dr. Richtner, the resident physician, examined her, and within the hour she was given a shot of Demerol, "a narcotic-like agent for pain." R. XII-2367-2369.

Shortly after examining the juror, Dr. Richtner telephoned Dr. Sanbar and reported the situation to him. The juror was "apprehensive or nervous," but a cardiogram "did not show any evidence of heart attack." Dr. Sanbar asked Dr. Richtner to make an enzyme test, and "to keep her overnight in the hospital in the event that there is any minor abnormalities, in order to be sure that she's not going to have a heart atack." The enzyme test proved to be "border line," and Dr. Sanbar asked Dr. Richtner to keep the juror in the hospital until he could see her. Dr. Sanbar saw the juror at the hospital at 10:30 or 11 o'clock that morning, and found no evidence of a heart attack, but he was not sure whether her chest pains were due to her heart or her arthritis. R. XII-2368, 2392-2397, 2411-2412.

It was then that Dr. Sanbar directed that she be given a Valium—a tranquilizer—at noon, and take one Motrin 400 —a pain-killer—four times a day. R. XII-2390, 2399-2401; p. 29, *supra*. While Dr. Sanbar testified that the juror "takes" Valium "during the day at home," on his prescription, he had never seen her after she had taken some and thus could not say how it affected her judgment, R. XII-

2415-2417. In response to a question whether the Valium she took at noon would affect her ability to exercise judgment, Dr. Sanbar stated, R. XII-2402, 2403:

> This is truly a very difficult question to answer for me, because every individual varies and even though I have known her since '73, I honestly cannot answer that unless I see her and see what she does. And usually to answer such a question requires even somebody who is more specialized than I am, a psychiatrist, to determine judgment. The Valium, no question, influences people, relaxes them. And I know this seems I am talking in generalities because I cannot, and I repeat, I cannot be too emphatic about any individual when one gives Valium, it can literally put somebody to sleep, relaxes them so much, a 5 milligram dose; while in other people, 5 milligrams will be like a drink of water and because of the variability, it is very difficult to answer this question so specific.
>
> In her case, she stated to me that the Valium was helping her to relax and had been more collected, and that's really all I can say. It's very difficult for me to know how—what her judgment or recall of events, what Valium would have—what effect would Valium have on her recall or judgment. This is a very difficult question to answer.

He further testified, R. XII-2403-2404:

> Q. Now, you have not seen her since she took the Valium at 12:00 noon?
>
> A. No, sir. I saw her the last at eleven o'clock, I think around eleven o'clock.
>
> Q. Doctor Sanbar, let me ask you this: Is there a possibility that the taking of Valium, 5 milligrams, by Mrs. Meyer at 12:00 noon today could affect her exercise of judgment?

A. You're asking me is it possible that it could?

Q. Yes, sir.

A. I think it is possible that it could.

Q. Is it possible that the 5 milligrams of Valium taken at noon today would affect Mrs. Meyer's state of mind?

A. Again, it is possible that it could.

Q. Is it possible that the 5 milligrams of Valium taken by Mrs. Meyer at 12:00 noon today could affect her ability to recall past events?

A. Again, I think we are in the realm of possibility. A patient who is 65-years-old, and I again have to fall back on generalities in terms of medicine, older people given doses of medication tend to react more to them than, say, somebody my age. I may take Valium, 5 milligrams, and may not affect my judgment whatsoever. On the other hand, 65-years-old, we always give them lesser doses of medication. They most generally require less medicine and, therefore, we go back to the "could and possible" so I would have to put it in the realm, it could and be possible but I can't be very specific about her.

Again, Dr. Sanbar testified, R. XII-2415, 2416:

The Court: In this particular lady, do you have any idea as to whether taking the Valium tablet at 12:00 noon would keep her from being a reasonable person as far as her thinking processes are concerned?

The Witness: Sir, you have asked me this, I beg your indulgence, you have asked me this and I have been asked many times by everybody and I can answer, it has to be in the realm of could and possible. I don't know. I could not be any more specific.

The Court: Also, it could not have any effect on her reasoning?

The Witness: I believe it can affect her or it can not, it could be that she—

The Court: Then you just don't know?
The Witness: I don't know.
The Court: It could or could not.
The Witness: It's in the realm of could and possibility, that's the way I have to answer.

But Dr. Sanbar did testify, R. XII-2400, 2401:

> I believe Demerol works for approximately four to six hours effect and usually we have to give this medicine around every four hours to keep it level. It disappears from the body maybe around ten or so hours, so it lasts in the body obviously longer than, say, 5:30 till 1:30, so she obviously had some Demerol present in her system at 1:30. And of course, Valium was given at 12:00; and, again, Valium works in an almost similar timing, about four to six hours. We give narcotics usually around every four hours to keep patients comfortable.

At 4:30 p.m. the trial judge repeated in open court what he had previously reported in chambers, just as Dr. Sanbar was being excused, that the jury had reached a verdict, R. XII-2417, 2421, and at 4:40 the jury returned with its verdict of guilty. Accordingly, at all times while the juror Meyer was participating in the jury's deliberations between 1:30 and about 4:30, she was subject to whatever effect Valium had on her, and for most of that period still had Demerol in her system. Demerol is, as Dr. Richtner testified, a "narcotic-like agent for pain", R. XII-2368, 2369, and Valium is, under its generic name of diazepam, 40 F.R. 4016, 4017; R. III-489, 495, on Schedule IV of controlled substances under §202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Tit. 21 U.S.C. §812, as a depressant. 21 CFR 1308.14.

Additionally, if the juror had followed Dr. Sanbar's instructions that morning (as to which the record is silent) by the time the jury returned its verdict, she had taken one or two Motrin 400's—the "medicine for arthritis pain". See p. 29, *supra;* R. XII-2399. Moreover she must have had a restless night since she was up and about before 5 o'clock in the morning, notwithstanding the two or three Valium tablets and the Dalmane which Dr. Sanbar had instructed her to take. Court's Exh. 7, Supplemental Record, Volume 1; R. XII-2371, 2386-2391.

The jury had not been able to arrive at a verdict between sometime before lunch on March 12 and 4:30 in the afternoon on March 13, when its deliberations were recessed because of Juror Meyer's illness. R. XII-2345-2347, 2349. Yet, the jury reached a verdict in less than three hours after her return on March 14. The natural inference from this is confirmed by broadcast interviews of Juror Meyer, given after the verdict. R. III-497-506. From these it appears that before the recess on March 13, she was steadfast for acquittal, but upon her return to the jury room on March 14, she, R. III-497,

> didn't feel very good. Not after you have had Demerol you don't feel good. * * * I just either had to give up or else. I didn't feel like I could spend another night up there * * *.

And further, R. III-500,

> And I just felt like that I just couldn't hold out any longer because I was still on the influence of that medicine which I had a shot and taken earlier tranquilizers.[10]

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10. In denying one of petitioner's post-verdict motions, the district court held that these transcripts were "outside the record". App. C, p. 57a, *infra.* But, they had been submitted to the district court in support of the very motion he was denying. R. III-483-486.

But wholly apart from any consideration of such interviews, *cf. United States* v. *Glick,* 463 F.2d 491 (2d Cir. 1972), Dr. Sanbar testified that it was "possible" that the Valium she had been given "could" affect her judgment, state of mind, recollection, thinking processes, reasoning, etc., although it was also possible that it might not. See pp. 33-34, *supra.* On the other hand, he testified, see p. 33, *supra,* that

> * * * Valium, no question, influences people, relaxes them. * * * it can literally put somebody to sleep, relaxes them so much, a 5 milligram dose * * *.

And, it was a 5 milligram dose that he had the juror take just an hour and a half before she returned to the jury room. See, p. 32, *supra.*

In these circumstances, it would seem clear that juror Meyer had been "subjected or exposed" to something, *i.e.,* drugs, particularly, Valium, "which might tend to * * * influence" her "consideration" of the case. And, in such circumstance, "a presumption arises against impartiality * * * [which] can only be rebutted by a clear and positive showing that * * * [it] did not influence" the verdict. See, *Baker* v. *Hudspeth,* 129 F.2d 779, 782 (10th Cir. 1942), *cert. denied* 317 U.S. 681; see also, *Mattox* v. *United States,* 146 U.S. 140, 150 (1892); *Ryan* v. *United States,* 181 F.2d 779, 780 (D.C. Cir. 1951).

In view of the tenor of Dr. Sanbar's testimony, which was given before the jury's verdict was returned, the district court should have granted petitioner's motion for a mistrial, or his post-verdict motion for a new trial, R. III-439, 441, 444-446, as there had been no showing whatsoever that juror Meyer's exposure to Valium, and the district

court's anxiety to "finish" the case "today", did not tend to influence her consideration of the case. In affirming, the court below said, App. A, p. 19a, *infra*:

> *The fact* that Mrs. Meyer returned voluntarily to jury duty is evidence that she had *some* will and individual determination. [Emphasis supplied]

But, obviously, whether a juror has been exposed to something "which might tend * * * to influence" her "consideration" of the case, does not hinge on whether it has stripped her of *all* will and determination. Moreover, is it a *fact* that she returned voluntarily? The district judge's telephone communication with Dr. Sanbar, and through him with the juror, was wholly *ex parte,* off the record, and without prior notice to petitioner. Furthermore, in later disclosing his communication with Dr. Sanbar to counsel, he made no mention of his statement to the doctor, as the doctor put it, that he, see pp. 28, *supra,*

> would like to proceed with the case and * * * would like to finish it today and is it possible to get her back.

Nor did he mention his communication with the juror through the doctor. R. XII-2354. But the judge's statement to the doctor (however actually made) must have had a coercive effect on Dr. Sanbar, for it impelled him, notwithstanding his considered professional judgment to keep the juror in the hospital another day, to let her go, if she had felt up to it. See p. 28, *supra.* And, if the district court's desire to "finish" the case "today" was conveyed by the doctor to the juror (which is probable, although, the record is silent on the point) it must unavoidably have had a coercive effect on her, "to finish it today". *Cf. Jenkins*

v. *United States,* 380 U.S. 445 (1965); *United States* v. *Thomas,* 449 F.2d 1177, 1181 (D.C. Cir. 1971).

Clearly, the district judge should not have communicated with Dr. Sanbar, or through him with the juror, by telephone, *ex parte* and off the record. Nor should he have undertaken to determine whether his or the doctor's version of their telephone conversation was correct. See, *United States* v. *Columbia Broadcasting System, Inc.,* 497 F.2d 107, 109 (5th Cir. 1974). Indeed, the question would not have arisen if the district court had followed the accepted and usual course of judicial proceedings, which, unless the parties agree otherwise, is to conduct all proceedings in a case in open court or in chambers, with prior notice to all parties and on the record. In affirming, the court below said, App. A, p. 21a, *infra*:

> The trial judge was faced with a difficult situation which made it necessary that he communicate with the doctor and through the doctor with the juror in order to ascertain her condition. The judge was the person best qualified to carry out the inquiry. We see no impropriety in the judge's communicating with the juror through the doctor.

Granting the difficulty of the situation and that it was necessary that the judge communicate with the doctor and through him with the juror, nevertheless, *propriety,* and more, clearly required that the communication with the doctor be in open court, or in chambers, on the record, and after notice to the parties.

Juror Meyer's ingestion of drugs, and the *ex parte,* off the record, telephone communications by the trial judge

with Dr. Sanbar, and through the doctor with the juror, being matters which might tend to influence her consideration of the case, and there being no showing that they did not, petitioner is denied his Sixth Amendment right to a trial by an impartial jury, and, additionally, in affirming petitioner's conviction in the circumstances of the case, the court below has so far sanctioned departures by the district court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

4. *The district court's communication with the juror's physician, and through him with the juror, described under 3, above, without petitioner being given an opportunity to be present, denied petitioner his fundamental right under Rule 43(a) of the Federal Rules of Criminal Procedure to be present at every stage of the trial, and such denial is aggravated by the failure of the district court to have such communication recorded. In nevertheless affirming, the court below decided a federal question in a way in conflict with applicable decisions of this Court, and so far sanctioned departures by the district court.*

Petitioner's right under Rule 43(a), F.R.Crim.P., to be present at every stage of the trial is a fundamental right having its roots in the Fifth and Sixth Amendments, and in their common law origins. In the absence of a waiver, it is not lightly to be denied. *Cureton* v. *United States,* 396 F.2d 671 (D.C. Cir. 1968); *Evans* v. *United States,* 284 F.2d 393 (6th Cir. 1964). Thus, in *United States* v. *Arriagada,* 451 F.2d 487, 488 (4th Cir. 1971), the court said:

> Rule 43 * * * requires the presence of the defendant at "every stage of the trial". Such rule, manifestly proscribing any communications by the Court with the jury, whether before or after it has begun its deliberations, without the presence of the defendant, has properly been described as "a salutary provision" which should be scrupulously observed by trial judges. Any departure from the rule is error and, "unless the record completely negatives any reasonable possibility of prejudice arising from such error", mandates a new trial. Jones v. United States (10th Cir. 1962) 299 F.2d 661, 662, cert. den. 371 U.S. 864, 83 S.Ct. 123, 9 L.Ed.2d 101.

Here, as petitioner had no prior notice that there was going to be any communication between the judge and the juror's physician, there can be no question of waiver.

Coercion by a judge of a physician to take action in regard to a juror, contrary to his considered professional judgment, and of the juror to reach a verdict "today", is a most serious matter. Such coercion is implicit in the physician's testimony concerning the judge's communication to him, see p. 28, *supra,* which may or may not accurately reflect the language actually used by the judge. And, the judge's failure to have his communication with the physician recorded, violated the spirit, if not the letter of the Reporter's Act, Tit. 28 U.S.C. §753(b). *Cf. Edwards* v. *United Statse,* 374 F.2d 24, 26 (10th Cir. 1967); *Parrott* v. *United States,* 314 F.2d 46, 47 (10th Cir. 1963); *Fowler* v. *United States,* 310 F.2d 66, 67 (5th Cir. 1962).

The communication was both private and unrecorded by *ex parte* and *sua sponte* action of the court. In this circum-

stance, and the other circumstances of the case, the affirmance by the court below decided a federal question in a way in conflict with applicable decisions of this Court, and so far sanctioned departures by the district court. *Rogers* v. *United States*, —— U.S. ——, 95 S. Ct. 2091 (1975); *Jenkins* v. *United States*, 380 U.S. 445 (1965).

5. *The district court refused to examine prospective jurors who had heard or read pretrial news accounts of the charges against petitioner, with particularity to elicit answers which would be a basis for objectively determining the impact, if any, of such news accounts on the juror's impartiality. The district court was content to rely on the jurors' subjective responses to general questions, to the effect that they had not formed opinions as to petitioner's guilt in consequence of having read or heard such news accounts, and that they could put aside any information they had gotten from such news accounts, etc. ..Petitioner is a well known public figure in Oklahoma, and pretrial news accounts of the case were read or heard by all proposed jurors who were examined. ..The nature of the news accounts was such that 4, or possibly 5, of the approximately 31 jurors examined admitted that they had formed opinions as the result of reading or hearing them. In affirming, the court below decided an important question of federal law which has not been, but should be, settled by this Court.*

In denying petitioner's motion for a continuance or a transfer of the case because of extensive and prejudicial pretrial publicity, the district court pointed to the examination of prospective jurors as *prima facie* affording adequate safeguards, holding, R. II-242; R. VII-60-62:

> * * * The procedural safeguards of the voir dire examination of jurors * * * provide the ultimate test of whether it is possible to select a fair and impartial jury from the panel selected from the vicinity where the publicity occurred. If utilization of this procedure demonstrates that it is not possible then a continuance or transfer or both on request are available for consideration.

Accordingly, in addition to requesting the court to ask twenty-seven questions, generally, of prospective jurors, petitioner requested the court to ask nineteen additional questions of each prospective juror (individually and not in the hearing of the others) who have "read or heard of or discussed this case or anything related to it or any of the defendants * * *." R. II-338-347.[11] These additional questions were calculated "to elicit answers which will provide an objective basis for an evaluation" of the prospective juror's impartiality. R. II-339, for, the defendant in a criminal case has the right to "probe for hidden prejudices of the jurors." *Lurding* v. *United States*, 179 F.2d 419, 421 (6th Cir. 1950). The District Court, however, denied petitioner's request for such additional examination, R. VIII-146, and was content to rely on the prospective jurors' untested *ipse dixit* that they had not "formed an opinion * * * about the guilt of either of the Defendants * * *" as the result of what they had "read, heard or listened to on the news media," or by any other discussion with anyone about this case * * *," and "will be able to put aside * * * anything" that they had "read, listened or

11. In referring to the nineteen additional questions, the court below fails to note that petitioner requested that they be asked *only* of such prospective jurors as had "read or heard of or discussed this case," etc. App. A, p. 23a, *infra*.

heard about this case in the news media." R. VIII-26-27, 33-35, 44-47, 54-55, 65-66, 75-76, 82-84, 92-93.

While the court below affirmed, it nevertheless acknowledged, App. A, p. 26a, fn. 12, *infra*, that:

> * * * it might * * * have been better practice in view of publicity involving a public figure to conduct individual *voir dire* of the prospective jurors. *See* ABA Standards Relating to Fair Trial and Free Press, Approved Draft, March 1968, Section 3.4.

Then, it added, "However, this does not suggest that it was error to fail to do so." On the contrary, it would seem to suggest more clearly that it was error. The court below advances no reason why anything less than the "better practice" can suffice to provide the trial by an impartial jury which the Sixth Amendment both assures and commands. Indeed, its only reliance is that this case "differs" in some respects from *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968), *appeal after remand*, 430 F.2d 675 (1970), *cert. denied*, 400 U.S. 1022 (1971). But the differences are wholly without significance. Thus, in affirming, the court below said, App. A, pp. 25a-26a, *infra*:

> In * * * [*Silverthorne*], involving criminal charges against the president of a failed * * * bank, there was massive, inflammatory pre-trial publicity * * *. In contrast, the news reporting in the instant case was neither virulent nor massive. Moreover, in *Silverthorne* the prospective jurors had heard of the case, also 30 percent had formed prior opinions. Here, only three or four of the prospective jurors out of approximately 31 who were questioned had preformed opinions.

However, the question is not whether the journalistic style of the news accounts was of the "yellow" variety, or straight, or even understated. It is, rather whether the news reports, whatever their style, had an impact on the impartiality of the prospective jurors. Here, on the basis of the "three or four" postulated by the court below, somewhere between 9.67% and 12.9% of the prospective jurors *admitted* to "preformed opinions," which is hardly an insignificant segment of the group. Actually, however, there were at least four, and possibly five, which would bring the percentage up to between 12.9% and 16%. R. VIII-28, 150, 152, 156. Nor is the volume of the news reports, *per se*, of any importance. What is important is the extent to which prospective jurors had heard or read them. Here, although the court below is strangely silent as to it, *all* the prospective jurors who were examined (and consequently, all the jurors who sat on the case) had heard or read pretrial news accounts of the case. R. VIII-25, 26, 33, 34, 45, 46, 54, 65, 67, 75, 83, 92, 102, 103, 108, 114, 122, 130, 138, 149, 154, 158. Thus, here, the pretrial news accounts, which the court below dismisses as not being "massive," were, in fact, sufficiently extensive to have been heard or read by all the prospective jurors examined.

And, whether or not the pretrial news accounts which the prospective jurors heard or read were "virulent," they were sufficiently incisive to have caused some 13 to 16 percent of the jurors examined to admit that hearing or reading them had resulted in their having formed opinions concerning the case. Moreover, testimony of professional newspapermen taken at the hearing on petitioner's

pretrial motion for a continuance or transfer,[12] is that the pretrial newspaper accounts were prejudicial to petitioner, and effectively created prejudice against him in those who read them. R. IV-653, 654 [Hall Exhs. 1, 2]; R. VII-16-50.

The court below also dismissed pretrial "articles which reported investigations" concerning petitioner in regard "to other offenses" as not being "inflammatory." App. A, p. 25a, fn. 11, *infra*. But the fact of such investigations would not, of course, be admissible at the trial, and as this Court said in ordering a new trial in *Marshall* v. *United States*, 360 U.S. 310, 312, 313 (1959), because during the course of a trial, accounts of the defendant's inadmissible criminal record were published in the newspapers:

> The prejudice to the defendant is almost certainly to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence.

And, as the court said in *Silverthorne*, in circumstances thus not in their essentials dissimilar from those of this case, 400 F.2d at 638:

> * * * we conclude that the trial court's voir dire examination did not adequately dispel the probability of prejudice accruing from the pre-trial publicity and the

12. At this hearing the trial court declined to hear testimony of witnesses proffered by petitioner to show that the government was the source of much of the material contained in the pretrial news stories. R. VII-5, 6, 11, 50-52. Later, during the trial, the district court denied petitioner's motion for a mistrial when the prosecution released to news media, and the media used in news accounts, transcripts of tapes which were not in evidence. The court said there was no evidence that the unsequestered jurors had not complied with his admonition not to read or listen to anything concerning the case, etc. R. IX-524-532. But unless they were asked, there was no way of knowing whether they did or not. *Cf. Coppedge* v. *United States*, 272 F.2d 504, 507, 508 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855.

> jury panel members' knowledge of the case. This conclusion is predicated on two grounds: (1) the questions propounded by the court to the prospective jurors were calculated to evoke responses which were subjective in nature—the jurors were called upon to assess their own impartiality for the court's benefit, and (2) the entire voir dire examination was too general to adequately probe the prejudice issue.

That is, precisely what the court below, by its affirmance, sanctioned here.

Then, to leave no doubt as to the proper course for a trial court to follow in circumstances such as those here, the court continued, *id.*:

> We agree with the language of the *en banc* majority in United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir.), cert. denied, 372 U.S. 978 (1963) that in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, "merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]." 313 F.2d at 372. We find this expression to be forcefully applicable to the instant case. Each and every juror in the case before us had read or heard *something* about appellant's case. The trial court made no effort to ascertain *what* information the jurors had accumulated and, consequently, had no way of objectively assessing the impact caused by this pretrial knowledge on the juror's impartiality. [Emphasis by the court]

See also, *United States* v. *Addonizio,* 415 F.2d 49, 65 (3d Cir. 1972), *cert. denied,* 405 U.S. 936; *United States* v. *Starks,* 515 F.2d 112, 125 (3d Cir. 1975).

Here the court below affirmed notwithstanding the refusal of the trial court to ask questions of the prospective

jurors "designed to elicit answers providing an objective basis for the court's evaluation" of their impartiality, and merely went through "the form" of obtaining the juror's subjective assurances in that regard. And it affirmed although here, too, all the prospective jurors examined "had read or heard something" about the case, the trial court had refused to inquire what information they had accumulated, and accordingly, had no basis for "objectively assessing the impact" of the publicity on the juror's impartiality. A juror's *ipse dixit* as to his own impartiality is a slim reed, if reed at all, to lean on, for as this Court observed in *Irwin* v. *Dowd,* 366 U.S. 717, 728 (1961):

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.

The court below refers, for the "better practice," which it did not, however, follow in this case, to Section 3.4 of The ABA Standards Relating to Fair Trial and Free Press, Approved Draft, March 1968. App. A, p. 26a, fn. 12, *infra.* In *Silverthorne,* 400 F.2d at 638, 639, the Ninth Circuit cited the same text in reversing a conviction where that practice was not followed. In *Addonizio,* 451 F.2d at 67, and *Starks,* 515 F.2d at 125, the Third Circuit announced that henceforth district courts would be required to follow such practice in appropriate cases. In substance, the practice, as stated in the ABA Standards cited above, is:

> Whenever there is believed to be a significant possibility that individual talesman will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect

> to his exposure shall take place outside the presence of other chosen and prospective jurors. * * * The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

While this Court has adverted to the problem of assuring trial by an impartial jury in the face of pretrial publicity, *see, e.g., Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966), it is not believed that this Court has decided what procedure should be followed in such cases, in the examination of prospective jurors who have been exposed to pretrial publicity concerning the case or the defendant, in order to assure trial by an impartial jury. Since trial by an impartial jury is both guaranteed and commanded by the Sixth Amendment, this is an important question of federal law which should be settled by this Court.

6. *Petitioner and a witness against him called by the prosecutor had been charged by the Grand Jury as co-defendants in the conspiracy count—Count II—of the indictment. On direct examination of the witness, the prosecutor elicited that fact, and also the fact that prior to trial the witness had pleaded guilty to Count II. On his cross-examination of petitioner, the prosecutor dwelt at length on the plea of guilty of such witness, the circumstances surrounding it and its consequences to the witness. In his summation to the jury, the prosecutor advanced the witness' plea of guilty and its consequences to him as assurances of his veracity as a witness. In the circumstances,*

the cautionary instruction of the district court was wholly inadequate, and petitioner was denied his Fifth Amendment right to a fair trial.

The fact of the prior conviction on plea of guilty, or otherwise, of a co-defendant is not evidence of the defendant's guilt, and, in consequence is not admissible in evidence, whether in documentary form, or elicited from a witness. Such evidence is, obviously, highly prejudicial to the defendant, and its admission is reversible error, particularly if it is emphasized, and in the absence of clearly curative instructions to the jury. *See, e.g., Leroy* v. *Government of Canal Zone,* 81 F.2d 914 (5th Cir. 1936); *United States* v. *Toner,* 173 F.2d 140, 142, 143 (3d Cir. 1949); *Babb* v. *United States,* 218 F.2d 538 (5th Cir. 1955); *Payton* v. *United States,* 222 F.2d 794, 796 (D.C. Cir. 1955); *United States* v. *Restaino,* 369 F.2d 544, 545 (3d Cir. 1966); *United States* v. *Newman,* 490 F.2d 139, 143 (3d Cir. 1974).

This is so even where testimony concerning a co-defendant's conviction is introduced inadvertently. *Newman,* 490 F.2d at 143 fn. 4. Here, the prosecutor inadvertently elicited testimony disclosing the co-defendant's guilty plea, and he compounded its prejudicial effect by unduly emphasizing it to the jury in his cross-examination of petitioner and his summation. *Cf. Payton,* 222 F.2d at 796.

At the close of his direct examination by the prosecutor, the prosecution's witness Mooney testified, R. VIII-303, 304:

> Q. Now, were you indicted in this case along with Mr. Hall and Mr. Taylor?
>
> A. Yes, I was.

Q. And how did you plead to Count Two, the Conspiracy Count?

A. I pleaded guilty to Count Two.

Q. Was that plea a result of an agreement with the prosecution?

A. Yes, it was.

Q. What was that agreement, sir?

A. In exchange for my testimony, my willingness to testify, my willingness to make a complete, open and full disclosure, that the Counts Five and Six would be dropped.

Q. And have those Counts been dropped?

A. They have.

Q. And did you enter that plea because you were guilty of Count Two?

A. Yes, I was.

The prosecutor reverted to Mooney's guilty plea in cross-examining petitioner, R. XI-1675-1680:

Q. You testified, Mr. Hall, that you believed that Kevin Mooney became a part of this conspiracy against you after he had entered a plea of guilty in this Court.

A. That's correct, Mr. Burkett.

Q. What do you believe that he did to further the conspiracy?

A. I believe he testified falsely.

* * *

Q. Were you in the Courtroom when he entered that plea of guilty?

A. Yes, I was.

* * *

Q. *He plead guilty, did he not, Mr. Hall, to conspiring with you and Mr. Taylor to use Interstate Com-*

merce for the purpose of—for an unlawful purpose, did he not?

A. He did but that was at your suggestion.

* * *

Q. Well, Mr. Hall, Mr. Mooney did state and the Court inquired into this agreement under which the matter, the plea, was entered; is that not true?

A. Yes. And Mr. Mooney—

Q. *Was it not represented to the Court, Mr. Hall, that Mr. Mooney was pleading guilty because he was guilty and that the—in return for his plea, the Government dismissed two other counts against him?*

A. You said that. Mr. Mooney said, when the Judge asked him, that there had been no agreement and you jumped up and said, "Oh, yes, there has. I've agreed to dismiss." That's exactly what happened in the Courtroom.

Q. Certainly. Do you have any reason to doubt that?

A. No. No. I believe it. I think that's what you agreed to do.

Q. Do you contend that Mr. Mooney plead guilty to an offense of which he was not guilty?

A. I don't know that in fact. I didn't advise him.

Q. You say that he is a part of this conspiracy and *I'm wondering if you're trying to tell this Jury that Mr. Mooney entered into a plea of guilty to a felony and subjected himself to the consequences of that plea, including, of course, his disbarment.*

A. That is correct.

Q. Merely as a plot to further a conspiracy against you?

A. No. No. I think Mr. Mooney, that he had been caught offering a bribe to Rogers, or extorting money, whichever way I take the tapes.

Q. Of course, that's not what he plead guilty to.

A. No. He plead guilty to the lesser offense, didn't he?

Q. *No, sir. He plead guilty to a conspiracy, entering into a conspiracy with you and Mr. Taylor to use Interstate facilities to violate a law.*

* * *

Q. * * * Now, do you know Rooney McInereny?

A. I know him well.

Q. Former Justice of the Supreme Court of Oklahoma?

A. Yes.

Q. Represented Mr. Mooney, did he not?

A. Yes. * * *

* * *

Q. Are you telling this Court that after Mr. McInereny had his client enter a plea of guilty, that he then allowed him to perjure himself?

A. I don't think he did it intentionally. [Emphasis supplied]

On summation, the prosecutor told the jury, R. XII-2187, 2188:

> Let's say something about Kevin Mooney. Kevin Mooney was up to his ears in this thing and he was caught and he made a full and clean breast of it, a full statement and breast of it all and did his very best to make it right. Hall wants to make him a conspirator. But if you believe that Kevin Mooney is a conspirator in this case, you have to believe that his lawyer, a distinguished former member of the Supreme Court, persuaded or allowed, deliberately, his client not only to lie but to plead guilty to a felony and suffer all of the consequences that a felony conviction imposes when he didn't do it. There isn't a lawyer anywhere that can

> talk a client into doing that. *I submit to you, Kevin Mooney's testimony is tested by the fire of his plea of guilty and by these obvious questions: Why should he lie? Why should he hold back anything from you? What does he have to gain by making false statements and perjuring himself from the witness stand? That only leads to another felony conviction. He had nothing to gain. He came in here and told, he bared his soul and he told it all.* And I'm anxious to hear how Mr. Thomas is going to fit him into this conspiracy. [Emphasis supplied]

According to the court reporter's transcript, the district court charged the jury, R. XII-2271:

> The plea of guilty of a Co-defendant who is alleged to be an accomplice with the Defendants on trial in the commission of certain by the jury as evidence of the guilt of the Defendants on trial as they stand charged herein and gives rise to no inference against the Defendants on trial.

Whether garbled or not, this instruction, couched only in generalities, can hardly be considered curative in view of the intensity and unrestrained forcefulness with which the prosecutor pressed Mooney's plea of guilty on the jury, and the uses to which he put it. Clearly, it was not sufficiently direct or specific to offset or negate the undue prejudice to petitioner which must necessarily have resulted from the prosecutor's conduct. By affirming, the court below has so far sanctioned a departure by the district court, from accepted procedures for assuring the fairness of trials in accordance with the Fifth Amendment, as to call for an exercise of this Court's power of supervision.

Conclusion

For all the foregoing reasons hereinabove set forth, this petition should be granted, and a writ of certiorari should issue to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

10th Circuit Court of Appeals Decision

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 75-1358 and 75-1359

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID HALL and W. W. TAYLOR,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. Cr. 75-8)

Mac Oyler of Oyler & Smith, Oklahoma City, Oklahoma, for Defendant-Appellant, David Hall.

Emmett Colvin of Colvin & Jackson, Dallas, Texas, for Defendant-Appellant, W. W. Taylor.

O. B. Johnston III, Assistant United States Attorney (David L. Russell, United States Attorney, Drew Neville, Assistant United States Attorney, William S. Price, Assistant United States Attorney, and William R. Burkett, United States Attorney on the brief), for Plaintiff-Appellee.

Before BREITENSTEIN, MCWILLIAMS and DOYLE, Circuit Judges.

Appendix A

DOYLE, Circuit Judge.

This is a criminal case in which appellants above named, Hall and Taylor, were convicted of violating the Hobbs Act, 18 U.S.C. Section 1951,[1] and the Travel Act, 18 U.S.C. Section 1952.[2]

The indictment charged offenses against David Hall, W. W. Taylor and R. Kevin Mooney. Mooney, however, entered a plea of guilty and testified against the others. The facts giving rise to the indictments were as follows:

Hall was at the time in question Governor of Oklahoma. W. W. Taylor was president, treasurer and secretary of

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1. Section 1951 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, included by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

2. Section 1952 provides in part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in paragraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

a corporation called Guaranteed Investors Corporation. Taylor developed a plan to sell ten million dollars in promissory notes of Guaranteed Investors, a newly formed corporation, which notes were to be secured by government guaranteed collateral. Taylor sought to sell these notes to the Oklahoma Employees Retirement System (System). Hall, Taylor and Mooney, the latter being a lawyer for Guaranteed Investors, made an agreement for the plan to be presented to the Chairman of the Systems' Board of Trustees. Hall did not control the board of the employees retirement system, but he had numerous contacts on the board because he had made appointments of several members of the board. Mooney had brought Hall and Taylor together. Hall agreed to use his influence to sell the plan to the board. He demanded, however, $100,000 to be divided between him and Mooney. Hall contacted John Rogers, Oklahoma Secretary of State and Chairman of the Board of Trustees of the System, and told him that $50,000 would be paid to them, meaning Hall and Rogers, if the Taylor plan was accepted by the board of the employees retirement system. The $50,000 was to be divided equally between Rogers and Hall. Hall then advised Mooney that he (Mooney) was going to pay one-half of the $25,000 which was to be paid to Rogers. True to his word, Hall persuaded the members of the board to approve of the Taylor plan and it did so on December 23, 1974, subject only to a letter of legality from the Attorney General plus a letter of approval from the investment counselor of the board.

The indictment contained six counts. Count 1 alleged that Hall attempted to extort $50,000 from Taylor and

Appendix A

Mooney and Guaranteed Investors Corporation in violation of the Hobbs Act, Section 1951, *supra.*

Count 2 arose under Section 1952, *supra.* It charged that the three defendants conspired to travel in interstate commerce and to use facilities in commerce with the intent to promote, manage, and carry on unlawful activity and a scheme to bribe a public officer or officers for the purpose of influencing the board of employees retirement system to invest ten million dollars in Guaranteed Investors Corporation in violation of Section 381, Title 21, O.S.A., and to accept a bribe in violation of Section 382, Title 21, O.S.A., in violation of Section 1952, Title 18 U.S.C.

The count further alleged that the conspiracy also involved the payment of $50,000 for which Hall would use his official position to influence Rogers, the Chairman of the Board of Trustees of the System, to call meetings and to gain approval of the sale of the ten million dollars in securities of Guaranteed Investment Corporation.

In Counts 3 and 4, Hall was charged with attempting to bribe John Rogers and with accepting a bribe himself in violation of 21 O.S.A. Sections 381, 382, together with Section 1952 of the Federal Criminal Code.

Counts 5 and 6 charged Taylor and Mooney with attempting to bribe Hall and Rogers in violation of 21 O.S.A. Section 381, together with Section 1952, *supra.*

Previously Taylor had sought to sell his plan through Mooney to the Board of Trustees of the Retirement System,

but to no avail. Only after a meeting with Hall in Forth Worth, Texas, at which time Hall told Mooney that he thought his effort should be worth $100,000 which he characterized as a finders fee and which he offered to share equally with Mooney, did things begin to happen.[3] This took place on December 2, 1974, and the next day Mooney told Hall that Taylor approved of the payment. The very same day Hall had his talk with Rogers, at which time he offered to split the $50,000 with him in exchange for his help in getting the Taylor plan accepted. It was some days later that Hall told Mooney that he expected him to contribute a part of his $25,000 to Rogers.

However, Rogers proceeded to the office of the Oklahoma Attorney General and reported the $25,000 offer. He did so on the same day that the offer was made to him. The Attorney General was out and so Rogers related the offer to an assistant attorney general. On December 4, Rogers met with Mr. Derryberry, the Attorney General, and a few days later the two of them met with the FBI. At that time Rogers agreed to monitor conversations by means of a microphone attached to his person and to his telephone. There is evidence that in the days following the described conversations, Hall contacted Rogers and other members of the board of trustees trying to persuade them to approve the plant. Furthermore, in December, Taylor and Mooney met with Rogers, Hall and members of the board on several occasions. At a number of the meetings with Hall and Rogers, the subject of the payment came up. Finally, on December 23, the board approved the plan subject to the

3. Hall wanted his $50,000 share to be paid in four annual $12,500 installments, beginning after he left office.

obtaining of a letter of legality from the Attorney General and a letter of commitment from the board.

On December 31, Hall told Mooney that any payment to Rogers was illegal under Oklahoma law and that Mooney should caution Taylor against making any such payments to Rogers. Nevertheless, Taylor and Mooney talked about paying Rogers in the form of a consulting fee and in subsequent conversations they talked to him (Rogers) generally about payments in an effort to gain the release of a commitment letter. Subsequently, Taylor showed the check to Mooney, which was payable to him but which was destined for Rogers.[4] He did not turn it over to him. But, finally, on January 13, Taylor advised Mooney that Rogers had agreed to the release without any payment being made. The next day Mooney went to Oklahoma City from Texas. When Rogers handed over the letter, Mooney was arrested. Hall and Taylor were subsequently arrested.

Mooney pled guilty to Count 2 of the indictment, whereupon the government dropped the charges against him which were set forth in Counts 5 and 6. The charges against Hall and Taylor were tried to a jury starting February 24, 1975, and continuing to March 14, 1975. As we have mentioned earlier, Hall was convicted on Counts 1, 2, 3 and 4, whereas Taylor was convicted on Counts 2, 5 and 6. Both sought judgments of acquittal of judgments notwithstanding the verdict or a new trial. These motions were denied.

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4. All of this activity was designed by Taylor and Mooney as a manipulative effort directed to persuading Rogers to issue the approval letter.

Appendix A

The several points raised by the appellants include the following:

1. That the indictment was insufficient.

2. That the court erred in its manner of dealing with a juror who became ill after the cause was submitted to the jury for determination.

3. That prejudice requiring reversal resulted from the pretrial publicity.

4. The refusal to give an instruction requested by Hall and Taylor.

5. The inadequate *voir dire* of prospective jurors.

6. The receipt in evidence of certain of the tape recordings.

7. Misconduct of the district attorney.

I

Whether the Indictment Was Deficient

The main objection of both defendants to the indictment arises from the withdrawal of a portion of it as surplusage. In addition, Hall argues that the indictment fails to adequately allege extortion and further contends the indictment was inconsistent in charging him, Hall, with extortion, and Taylor with bribery, offenses which were mutually exclusive and, therefore, failed to give adequate notice of the charge.

Appendix A

A. Whether the elimination of a charge against Hall was error

We consider first whether the court erred in striking a portion of the indictment. The language which was withdrawn is contained in Counts 2, 3 and 4. In Count 2, the conspiracy count, in the process of alleging the object of the conspiracy, it was said "and to accept such bribe in violation of Section 382, Title 21 O.S.A." In Counts 3 and 4 the court struck out or withdrew "and to accept a bribe himself in violation of Section 382, Title 21 O.S.A." In striking the language the judge explained:

> I consider this [a] matter of surplusage and I, out of an abundance of caution, fearful that this could be some measure of inconsistency, not as to Taylor necessarily, but as to Hall, so out of an abundance of caution, and since the courts involved with this, treated as surplusage, will set forth alleged violations of the Statute, I have decided to precede [*sic*] this way in the case. (R. VIII, p. 168)

Thus, the trial considered the portion stricken as surplusage subject to deletion without destroying the indictment's validity or depriving the court of its jurisdiction. In denying the motions of Hall and Taylor to dismiss, the court again stated that the withdrawn language was surplusage. Now both defendants renew their attack on the trial court's ruling, arguing that the court improperly amended the indictment and thus invaded their right to be indicted by the grand jury, a right guaranteed by the Fifth Amendment.

It is fundamental that an indictment being the product of the grand jury is not subject to amendment. This has

long been recognized. *Ex Parte Bain,* 121 U.S. 1 (1886). In the cited case the indictment had charged the defendant with making a false report regarding the condition of a bank with intent to deceive the comptroller of the currency and the agent appointed to examine the affairs of said associations as well as the United States and other persons unknown. The trial court struck the language of "the comptroller of the currency" as surplusage. Following this, the defendant was convicted. The Supreme Court ordered the issuance of the writ of habeas corpus and did so on the ground that the court was without power to make the change and that the result of it was to change the charging part of the indictment. The opinion indicates that any deviation from the rule is fatal.

More recently, in Stirone v. United States, 361 U.S. 212 (1960), the Supreme Court reaffirmed its holding in *Bain* saying that the latter case had never been disapproved and reaffirmed its holding that a defendant is not to be tried on charges not part of the indictment in its original form. The *Stirone* case was brought under the Hobbs Act and it charged the defendant with utilizing his influence as a union official to interfere with the shipment of raw materials destined for a factory. The trial court there charged the jury that they could convict even though there was interference with finished products rather than raw materials. The Supreme Court regarded this as being not an insignificant variance between allegation and proof. It held that the trial court was powerless to enlarge upon charges contained in the grand jury indictment. It did not, however, rule that a court was unable to *withdraw* charges and thus narrow the defendant's liability.

Appendix A

Through the years the *Bain* case has become less absolute in its effect. *See* United States v. Dawson, 516 F.2d 796 (9th Cir.), *cert. denied,* —— U.S. ——, 96 S.Ct. 104 (1975), recognizing that the court may change an indictment as to matters of form or surplusage. Federal Rules of Criminal Procedure 7(d); 8 J. Moore, Federal Practice, par. 7.05(1); 1 Wright & Miller, Federal Practice and Procedure: Criminal Section 127. Also, it is now agreed that courts are able to withdraw from jury consideration counts that are not supported by the evidence. Salinger v. United States, 272 U.S. 542 (1926); United States v. Dawson, *supra;* Bary v. United States, 292 F.2d 53 (10th Cir. 1961); United States v. Griffin, 463 F.2d 177 (10th Cir.), *cert. denied,* 409 U.S. 988 (1972); United States v. Musgrave, 483 F.2d 327 (5th Cir.), *cert. denied,* 414 U.S. 1023 (1973); New England Enterprises, Inc. v. United States, 400 F.2d 58 (1st Cir. 1968), *cert. denied,* 393 U.S. 1036 (1969).

Apart from insufficiency of evidence, the power to *withdraw* charges from the jury is no longer disputed. Thomas v. United States, 398 F.2d 531 (5th Cir. 1967); Overstreet v. United States, 321 F.2d 459 (5th Cir. 1963), *cert. denied,* 376 U.S. 919 (1964). Indeed, the focal point appears to be whether the change involves an expansion or a narrowing of the charges. *See* 8 J. Moore, Federal Practice, par. 7.05 (3). *See also* Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1176-68 (1960). This conclusion is supported by Salinger v. United States, *supra,* wherein the court withdrew a part of the indictment in a mail fraud case on the theory that it was not supported by the evidence.

Based upon this analysis, we conclude that there is no ground for complaint in the case at bar. Hall was charged originally with extortion, conspiracy to bribe a public official, bribery and acceptance of a bribe. The net result of the withdrawal reduced the charges to extortion, conspiracy and bribery. In so doing it reduced the charges against Hall. The ruling of the trial judge is supported by *Salinger,* by United States v. Griffin, *supra;* by United States v. Thomas, *supra;* and by United States v. Overstreet, *supra.*

Thus, we see no prejudice to Hall as a result of the action taken by the court. Possible prejudice to Taylor as a result of striking the charges against Hall is even more remote.

B. Whether the allegation of extortion was sufficient

Hall maintains that Count 1 charging him with extortion under the Hobbs Act was insufficiently set forth in the indictment. He says that the indictment fails to allege that he induced anyone to make payments by coercion or under color of official right. He argued this to the trial judge, who rejected it. He makes the same argument here. In our judgment, then, the trial court ruled correctly. The important elements in a Hobbs Act case, according to Stirone v. United States, *supra,* are interference with interstate commerce and extortion. The Act was originally used in cases involving extortion by labor union officials. In more recent times it was used in cases of corruption on the part of public officials. *See* United States v. Braasch,

505 F.2d 139, 150-152 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975), in which policemen were convicted under the Hobbs Act for carrying out the extortion of money from owners of bars and taverns. The Court of Appeals for the Seventh Circuit upheld convictions in this fact setting, recognizing that the use of public office to obtain payments comes within the part of the Act which provides "under color of official right" since it is the wrongful use of official power which is the congressional intent in using the wording "under color of official right." *See also* United States v. Crowley, 504 F.2d 992, 994-996 (7th Cir. 1974), which involved policemen collecting protection payments, and *see* United States v. Stasczuk, 502 F.2d 875, 877-878 (7th Cir. 1974), *cert. denied,* 96 S.Ct. 65 (1975). An alderman obtained payments for not opposing amendments to the zoning ordinance. There was an en banc hearing in this case, but it had nothing to do with the "under color of official right" part of the case. The influence of the alderman as being within the "under color of official right" standard was not changed.

Of a similar nature is United States v. Mazzei, 521 F.2d 639 (3d Cir.), *cert. denied,* 96 S.Ct. 446 (1975). *See also* United States v. Irali, 503 F.2d 1295 (7th Cir. 1974), *cert. denied,* 420 U.S. 990 (1975).

These cases show that it is unnecessary that the accused have absolute power to determine the issue. It is sufficient that it is within his jurisdiction (the scope of his office) and that the victim has a reasonable belief that he does have the power. In turn, it is the exploitation of this belief that

fulfills the requirement. *Cf.* United States v. Braasch, *supra,* at 151.

At bar we have the governor of a state dealing with a board with which he not only purports to have influence but indeed has influence. He exploited the belief in the victim in order to obtain payments. In doing so he induced payment "under color of official right." Further, the indictment in question is adequate in setting forth the elements of the offense and in giving notice. Hall could not have been in doubt as to the nature and character of the charge from an ordinary reading of the indictment, and from a reading of the Act he should have been convinced that force, violence or fear were not essential, but that "under color of official right" was an alternative way of violating. *See* 18 U.S.C. Section 1951(b)(2); United States v. Crowley, 504 F.2d 992, 994-996 (7th Cir. 1974); United States v. Kenny, 462 F.2d 1205 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972); United States v. Mazzei, 521 F.2d 639 (3d Cir.), *cert. denied,* 96 S.Ct. 446 (1975).

For a case closely similar to the one before us *see* United States v. Trotta, 525 F.2d 1096 (2d Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3439 (U.S. February 3, 1976) (Docket No. 75-1032).

In sum, we conclude that the misuse of Hall's office was sufficiently alleged. The indictment said that he attempted to use his office to influence the board's decision and that he had appointed certain members of the board. This, together with the elements of the statute which are set forth, results in the indictment's being sufficient.

Appendix A

C. The alleged inconsistency

Was there logical inconsistency in charging Hall with extortion in Count 1 and in charging Taylor with bribery and conspiracy to bribe in Counts 2, 5 and 6? We conclude that there was not.

The question of charging Hall with the acceptance of a bribe need not be considered. We disagree with the argument advanced that bribery and extortion are mutually exclusive. To be sure, they are distinct crimes as shown by United States v. Addonizio, 451 F.2d 49, 72-73 (3d Cir.), *cert. denied,* 405 U.S. 1048 (1972); United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), *cert. denied,* 404 U.S. 1058 (1972); United States v. Kahn, 472 F.2d 272, 278 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973). It cannot be said that in a bribery case there is never an aspect of coercion on the part of the bribee. The Seventh Circuit has said that such conduct (extortion) may also constitute classic bribery. The *Braasch* court also noted that bribery and extortion are not to be considered mutually exclusive nor does the fact that the alleged victims of the extortion were also bribers nullify anything. *See* United States v. Hyde, *supra.*

So, therefore, charging Hall with extortion and Taylor with bribery was not logically inconsistent. Nor do we see any inconsistency giving rise to the invalidity arising from Hall extorting from Taylor to bribe Rogers because, first, there is no logical inconsistency and, secondly, modern courts refuse to apply these mechanical rules which in years past made for easy but often very unjust decisions.

Appendix A

II

The Illness of One of the Jurors

After completion of the court's charge to the jury and after the court had checked with the jury to determine whether all of the members were in good health, the alternate jurors were discharged and the jury was sequestered. After a full day of deliberation, one of the jurors was not feeling well and permission was sought to stop deliberating at 4:30 p.m. Permission was granted. The following morning at around 5:00 a.m. the juror who had been ill, a Mrs. Dell Meyer, a 65-year-old lady, complained to the bailiff of chest pains. At her request the bailiff called Dr. S. S. Sanbar, her personal physician. On the doctor's advice she was taken to the emergency room of St. Anthony's Hospital and upon arrival at 5:25 a.m. she was placed under the care of a Dr. Kenneth M. Richter, a resident. The usual tests for a suspected heart attack were performed and although some irregularities in enzyme levels were found, the doctor's diagnosis was that she had tietzes, which in plain language is an arthritis-like inflammation of the ribs and sternum. The doctor administered a shot of Demerol, 50 mg, around 6:00 a.m., and after consulting with Dr. Sanbar, admitted her to the hospital for observation.

A meeting of counsel with the judge was held in the judge's chambers at 11:30 a.m. Judge Daugherty suggested that there be a stipulation between counsel to complete the case with less than 12 jurors in accordance with Rule 23(b), Fed.R.Crim.Proc. Counsel for the defendants refused and then moved for a mistrial. The judge then

stated that he had talked to Dr. Sanbar at 10:30 a.m. and had been advised that the doctor had examined Mrs. Meyer, had said that she would be able to resume her duties at 1:30 p.m. that day, and that he would release her from the hospital for that purpose. Based on that report, the court denied the motion for mistrial and ordered that jury deliberations be resumed at 1:30 p.m.

The trial court did accede to a defense request that the testimony of the doctors be taken in open court. Both doctors testified. Dr. Richter said that in view of the elevated enzyme levels, he thought it wise to admit Mrs. Meyer for observation and stated that he administered the Demerol at 6:00 a.m., and said further that its effects would wear off in three to four hours. He also testified that he did not believe that he administered any medication or that he had observed any physical condition that would impair Mrs. Meyer's mental faculties as of the time of the starting of deliberations.

Dr. Sanbar also testified. He said that he had been Mrs. Meyer's doctor since March 1973, having treated her for high blood pressure and related chest pains. On prior occasions he had prescribed various kinds of medication for her, including Dramamine, Ornex, Bentyl and Valium. He said that Mrs. Meyer had on March 13 at 6:00 p.m. contacted him about her sleep and nervousness problems. He had prescribed a sleeping pill. On March 14 he prescribed Motrin for arthritis pain. He described her enzyme levels as borderline normal or "very slightly elevated." He examined her at around 10:00 a.m. This was in the presence of a bailiff. He concurred with Richter's diagnosis that it

was an arthritis condition rather than a heart attack. Sanbar said that he had told the judge that he thought she should stay overnight in the hospital, but that at the judge's request said that he would ask her if she felt well enough to resume her duties and she said that she did. He thereupon discharged her from the hospital. Also, he said that Mrs. Meyer took 5 mg of Valium at 12 noon that day. He said he could not give an opinion as to whether this affected her mental processes.

On the basis of the testimony of the doctors, the judge once again denied the motion for a mistrial, saying that there was no support for a finding that Mrs. Meyer could not satisfactorily continue her juror duties as of 1:30 p.m.

Complaint is made that the administration of medication affected Mrs. Meyer's mental processes; that she was medically unfit; and that there was a violation of the sequestration state growing out of the bailiff's failure to report administration of the medication and the trial judge's communication with her through her doctor.

A. The juror's fitness

The problem here presented is unlike that which arises when a defendant offers a post-trial affidavit of a juror in an effort to impeach the verdict. In our situation medical testimony is offered in an effort to establish that the juror was unfit for jury duty, whereby the defendants were allegedly denied a jury trial by 12 competent persons.[5] The

5. *Cf.* 18 U.S.C. Section 1865(b)(4), not relied on by the defendants, which declares unqualified for jury service any person who "is incapacitated by reason of mental or physical infirmity, to render satisfactory jury service."

statutory standard set forth in the note is incapacity by reason of mental or physical infirmity and thus the issue is whether the trial court erred in not finding the existence of incapacity.

The defendants argue that from the total evidence there arises an inference that the juror lacked fitness physically and psychologically to serve. We disagree. The undisputed evidence given by Doctors Richter and Sanbar is that Mrs. Meyer had not suffered a heart attack. Although her physician recommended overnight hospitalization, he did not insist upon it and was governed by her own estimation of her physical condition. Given the fact that she was able to leave on March 14, there was an inference that the doctor was willing to discharge her for the purpose of jury duty. The difference between his account and that which the judge reported is insignificant. There is nothing in the record to even suggest that the doctor considered her incapable of continuing her service or that such continuation might constitute a danger to her health. Accordingly, we are of the opinion that as far as her physical condition was concerned, the evaluation from the evidence and the determination that she was able to continue is not erroneous. The defendants seek to make use of a stipulation tendered by the district attorney which recited that the juror's physical capacity was a binding admission. This stipulation was not accepted by the defendants and in our view had no evidentiary value either as a stipulation or admission.

Nor do we consider the psychological competency of the juror to be subject to question. As to the contention of the defendant that she was subject to anxiety, there would

have to be much more convincing evidence than we have to justify a finding that there existed psychological impairment, for it would have to establish clearly that she was incompetent to understand the issues and to deliberate at the time the services were rendered. *See* United States v. Dioguardi, 492 F.2d 70, 78 (2d Cir. 1974). This goes on the principle that an accused is entitled to a rational juror, but he cannot insist upon a perfect specimen. Citizenry differ in their general mental capacity, stability, anxieties, and ability to deal with stress. The juror could not be regarded as incompetent unless at the time of service she was incompetent to understand the issues and to conduct deliberation. Nothing in the evidence suggested that the juror here was so incapacitated that she did not perform as well as many people do ordinary occupational tasks. Peterman v. Indian Motorcycle Co., 216 F.2d 289, 293 (1st Cir. 1954). As to the drugs, we need only look to the testimony of the doctors that Valium is frequently prescribed for people doing ordinary business. There is no evidence that the mixing of Valium and the Demerol would have a cumulative effect.

The fact that Mrs. Meyer returned voluntarily to jury duty is evidence that she had some will and individual determination. In light of all of this, we do not think that there is the kind of clear evidence that would be required. Perhaps the best decision is that of the Second Circuit in United States v. Dioguardi, *supra*. There, subsequent to the case, the conduct of one of the jurors indicated a possible psychosis. Judge Lumbard, the writer of the opinion, noted that the evidence was insufficient to compel an inquiry.

Of a similar nature was Peterman v. Indian Motorcycle Co., *supra*. In this case also the parties sought to show that one of the jurors had symptoms indicating that a psychosis existed. The trial court rejected the contention, saying that the offer of proof was inadequate. This judgment was affirmed.

Also relevant is United States ex rel. Daverse v. Hohn, 198 F.2d 934 (3rd Cir. 1952). Here again there was a refusal to hear the claim in a habeas corpus proceeding. In Jorgeson v. York Ice Machinery Co., 160 F.2d 432 (2d Cir. 1947), Judge Learned Hand rejected efforts to allow impeachment of the jury's verdict where the foreman suffered mental distress when his son died during the jury deliberation.

We have considered the decision of this court in Baker v. Hudspeth, 129 F.2d 779 (10th Cir. 1942), which is relied on by the defendants. That case does not support defendants' position. We conclude that the contention is lacking in merit.

B. The alleged violation of sequestration

We must reject the contentions that the activities of the U.S. Marshals-bailiffs and of the trial judge were invalid per se. In the contrary, from what appears in the record the marshals and the judge were cautious in the extreme. None of the acts complained of show any influences.

C. Whether the trial court coerced the juror

Complaint is made that the querying of the juror through Dr. Sanbar constituted coercion or unauthorized

communication with a single juror. The trial judge was faced with a difficult situation which made it necessary that he communicate with the doctor and through the doctor with the juror in order to ascertain her condition. The judge was the person best qualified to carry out the inquiry. We see no impropriety in the judge's communicating with the juror through the doctor. What was said does not add up to pressure. Jenkins v. United States, 380 U.S. 445 (1965) is relied on, but it is not germane, for in that case coercion with respect to arrival of the verdict was exercised toward the entire group. Nor does Goff v. United States, 446 F.2d 623 (10th Cir. 1971) support the defendants. Similarly, Burrough v. United States, 365 F.2d 431 (10th Cir. 1966) is entirely distinguishable. In short, the trial court was careful and conscientious in dealing with a most difficult problem. We perceive no error.

III

Prejudicial Publicity?

Hall argues that the trial court did not take appropriate measures to counteract the allegedly prejudicial publicity which appeared prior to his trial. While he urges that the court's denial of his motions for continuance or transfer and for sequestration of the jury during the trial was error, his argument comes down to the adequacy of the *voir dire* of the prospective jurors by the trial judge. Hall contends that the court erred in refusing to allow counsel to ask the questions, in not asking all of the questions proposed by appellant, and in not questioning the jurors individually with regard to the publicity. He further contends that the *voir dire* as conducted by the court was inadequate.

Appendix A

Either the court or counsel may ask questions on *voir dire,* Fed.R.Crim.P. 24(a),[6] and it is the practice in this Circuit for the court to ask the questions. United States v. Addington, 471 F.2d 560 (10th Cir. 1973); Brundage v. United States, 365 F.2d 616 (10th Cir. 1965). The conduct of the *voir dire* is within the discretion of the court, Ristaino v. Ross, —— U.S. ——, 96 S.Ct. 1017 (1976); Ham v. South Carolina, 409 U.S. 524 (1973); United States v. Crawford, 444 F.2d 1404 (10th Cir. 1971); the court's exercise of that discretion will not be disturbed unless there is a clear showing of abuse. United States v. Hill, 526 F.2d 1019 (10th Cir. 1975); United States v. De Pugh, 452 F.2d 915 (10th Cir. 1971), *cert. denied,* 407 U.S. 920 (1972). It is the trial judge's duty to insure that the jurors empanelled are competent to serve, and, particularly, that they are impartial. Where there is a possibility that prospective jurors have been exposed to prejudicial publicity, the court must examine with care so as to insure that they are not biased. Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), appeal after remand, 430 F.2d 675 (1970), *cert. denied,* 400 U.S. 1022 (1971); 8 J. Moore, Federal Practice, par. 24.03.

Judge Daugherty asked approximately 19 or 20 questions of the jury array. Included were the general questions which are propounded in most cases. He also asked whether they knew any of the parties, their attorneys, or principal witnesses; whether anyone was employed by the state of Oklahoma and if so, whether that would affect their im-

6. "(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. * * *"

partiality; similarly, whether anyone was employed by the federal government; whether anyone or any members of the immediate family was in law enforcement or had attended law school. He also inquired whether anyone had read or heard any news accounts of the case; whether anyone had discussed it with persons outside the family; if there had been any discussion within the immediate family and was the juror the object of persuasion by family members; if anyone had formed an opinion; if anyone knew of any reason why she or he could not be fair and impartial; if they could put aside anything they had read, been told, or heard about the case. While all but one of the original 12 jurors had been exposed to news accounts of the case, no one had discussed it with persons outside of the family, and no one had been the object of persuasion. Two stated that they had formed an opinion, and, after a conference at the bench, during which the judge denied a defense request that the two be questioned individually to determine the nature of their opinions, they were dismissed. The court asked the same questions of all replacement jurors.[7]

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7. The court acceded to a defense request to ask a replacement juror about her husband's employer. And, following the seating of the initial 12 jurors, but prior to the peremptory challenges, he asked if any party had additional questions to be put to the array. The government had none; Taylor requested that they be asked if they had a prior acquaintance with any of the others. The judge asked the question of the 12 and of all those called as replacements for jurors who were peremptorily challenged. Hall requested that the court ask how many received newspapers published by the Oklahoma Publishing Company and of those, how many received the Oklahoma Journal. The court declined on the ground that the subject was covered by the questions concerning exposure to news accounts and the formation of opinions. He did ask, however, whether they could put aside any information acquired from news accounts.

Appendix A

Prior to the trial, Hall had submitted 27 general questions to be asked on *voir dire* as well as 19 questions, primarily with respect to publicity, to be asked on an individual basis. The court asked most of the first 27 questions[8] but not in the form proposed by appellant.

The court did question the jurors regarding their exposure to publicity; its questions were neither so numerous nor detailed as those proposed by Hall. The trial judge, however, ". . . was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner." Ham v. South Carolina, 409 U.S. 524, 527 (1973); United States v. Hill, 526 F.2d 1019 (10th Cir. 1975); United States v. Crawford, 444 F.2d 1404 (10th Cir. 1971). The court is required to ask questions that are adequate to test the jurors' qualifications; it need not ask questions that are cumulative. Brundage v. United States, 365 F.2d 616 (10th Cir. 1965). Here, while the court's questions were not so numerous as the appellant's submissions and were not as detailed, they contained the substance of Hall's proposed inquiries. In view of this, the court's action was not an abuse of its discretion.

In sum, the questions propounded by Judge Daugherty were sufficient to test their impartiality. All of the jurors who remained on the panel stated that although they had heard of the case, they did not have an opinion either way;

8. The court did not ask question 13a ("Has any prospective juror ever been a prosecution witness in a criminal case?") or question 23 ("Has any juror or any member of your family ever held or sought public office?").

those who had pre-formed opinions were excused by the court.[9]

Appellant's further argument is that the court's refusal to question the jurors individually was reversible error. He relies on Silverthorne v. United States, 400 F. 2d 627 (9th Cir. 1968), appeal after remand, 430 F.2d 675 (1970), *cert. denied,* 400 U.S. 1022 (1971). In *Silverthorne,* the defendant's conviction was reversed and remanded on account of the trial court's failure to inquire specifically into the jurors' impartiality. But, in that case, involving criminal charges against the president of a failed San Francisco bank, there was massive, inflammatory pre-trial publicity.[10] In contrast, the news reporting in the instant case was neither virulent nor massive.[11] Moreover, in *Silverthorne,* the prospective jurors had heard of the case; also, 30 percent had formed prior opinions. Here, only

9. That three or four of those called as prospective jurors admitted prior opinions indicates that there was no atmosphere here which would have inhibited the admission of bias or led to a "bandwagon effect" once one juror had admitted to an opinion. *Cf.* Irvin v. Dowd, 306 U.S. 717 (1961).

10. Over 300 articles appeared in San Francisco newspapers. There was also extensive television and radio coverage. The news accounts included information about Silverthorne's personal life, speculation about the reasons for the bank's faliure, and a story that indicated that the Comptroller of the Currency thought the defendant was guilty.

11. Between January 14, 1975 and January 28, 1975 (about a month prior to Hall's trial), approximately 17 articles which mentioned Hall and the instant case, appeared in four Oklahoma newspapers. The articles were essentially factual reporting, without opinion as to Hall's guilt. Those articles which reported investigations into other offenses mention the instant case as a matter of information, without undue emphasis. Since Hall had been under investigation for some time, newspaper articles reporting these investigations had appeared during 1974, but they were not inflammatory.

three or four of the prospective jurors out of approximately 31 who were questioned had preformed opinions. Thus, this case differs from situations like *Silverthorne* where massive, inflammatory publicity has created a hostile climate requiring extremely close scrutiny of the jurors. *E.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin v. Dowd, 366 U.S. 717 (1961); United States *ex rel.* Bloeth v. Denno, 313 F.2d 364 (2d Cir. en banc), *cert. denied*, 372 U.S. 978 (1963).[12]

We conclude that although all of the jurors had heard about the case,[13] the judge's questions, his excusing of those with opinions, and their statements of impartiality were sufficient to assure Hall's being tried by an impartial jury. *See* United States v. Liddy, 509 F.2d 428 (D.C. Cir. 1974) (general questions addressed to the entire array with individual questions put to those with opinions not an abuse of discretion in the trial of a defendant in the Watergate burglary case).

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12. We do not say that it might not have been better practice in view of publicity involving a public figure to conduct individual *voir dire* of the prospective jurors. *See* ABA Standards Relating to Fair Trial and Free Press, Approved Draft, March 1968, Section 3.4; *see also*, United States v. Colabella, 448 F.2d 1299 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972). However, this does not suggest that it was error to fail to do so.

13. "It is not required that the jurors be totally ignorant of the facts and issues involved. * * * To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 722-723 (1961).

Hall also mentions the denial of his motion for continuance or transfer. Fed.R.Crim.Proc. 21 provides that a criminal case shall be transferred to another district "if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." This determination is left to the discretion of the trial judge. United States v. Jobe, 487 F.2d 268 (10th Cir. 1973); United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973). The publicity here was not such as to call for a transfer, and the court, therefore, did not abuse its discretion in denying Hall's motion.

Finally, Hall mentions the denial of his motion for sequestration during trial. Whether or not the jury is to be sequestered is left to the sound discretion of the trial judge, given the circumstances at the time and place of the trial. United States v. Hill, 446 F.2d 201 (5th Cir. 1974); Blackmon v. United States, 474 F.2d 1125 (6th Cir. 1973), *cert. denied,* 414 U.S. 912 (1973). Appellant argues that contacts by a television news reporter with jurors during the trial indicates that the denial of the motion was reversible error. The reporter, however, informed the court immediately after the contact had been made, and a hearing was held at which it was determined that he spoke with two jurors and one juror's mother to ascertain their ages and that nothing was said about the case. While this incident should not have occurred, the prompt hearing assured the court that the jury had not been compromised. There

is nothing else in the record to indicate that the jurors had been exposed to outside influences during the trial.[14] We find no abuse.

IV

Miscellaneous Issues Raised by Hall

A. Challenge to the admissibility of tape recordings obtained by Rogers

John Rogers testified that following the approach to him by Hall he went first to the Attorney General and later to the FBI. Transmitter and recording equipment was attached to his person and telephones by the FBI. As a result, the conversations of Rogers with Hall and other principals in the conspiracy were recorded and were later received in evidence.

The defendants argue that it was error for the trial court to receive these in evidence. This argument is based on the provisions of an Oklahoma statute, 21 O.S.A. Section 1782 which makes unlawful the recording of a telephone conversation with another without that person's permission. It also prohibits the introduction into evidence of the recorded conversations. This statute is in conflict with the federal law governing the interception of wire and oral conversations, 18 U.S.C. Section 2510 *et seq.*, Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Section 2511(2) (18 U.S.C.) provides that:

14. While we find no prejudice here, we nevertheless would suggest that it would be better practice to have sequestered the jury.

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Clearly Rogers was acting under color of law and hence he is within the provisions of the quoted provision. Also, it is not disputed that Rogers consented to the recordings. Moreover, the constitutionality of the mentioned provision cannot be disputed. *See* Lopez v. United States, 373 U.S. 427 (1963); United States v. White, 401 U.S. 745 (1971). Federal law as to validity and admissibility governs. In general, the admissibility of evidence in federal criminal cases is governed by federal law. *See* United States v. Armocida, 515 F.2d 49 (3rd Cir. 1975); Ansley v. Stynchcombe, 480 F.2d 437 (5th Cir. 1973); United States v. Teller, 412 F.2d 374 (7th Cir. 1969).

Hall claims that the government orchestrated interstate calls in order to induce him to engage in illegal activity within the Travel Act. He relies on United States v. Archer, 486 F.2d 670 (2d Cir. 1973). However, the *Archer* case is not helpful to Hall. It is concerned with virtual entrapment. In the instant case Hall initiated the transaction with Rogers who went to the Attorney General and FBI. In *Archer* the authorities took the initiative. This makes a substantial difference.

Appendix A

B. Alleged prosecutorial misconduct

The prosecutorial "misconduct" which is relied on is not misconduct considered in individual instances or in its total effect. Examination of the instances relied on does not reveal conduct which would warrant a reversal. Aiuppa v. United States, 393 F.2d 597, 601 (10th Cir. 1968) (Murrah, C.J.), *cert. denied*, 404 U.S. 871 (1971). *See* United States v. Coppola, 479 F.2d 1153, 1162-63 (10th Cir. 1973).

V

The Specific Taylor Assignments

A. Whether the trial court erred in not allowing sufficient use of the letter of non-prosecution addressed to Rogers

The so-called Rogers letter was given to Taylor by the United States Attorney. In it the government agreed not to prosecute Rogers for acts or omissions incident to use of political campaign funds. Rogers' problem in the use of campaign funds was unrelated to the transaction that was being tried. The letter was offered by the defense as bearing on the issue of Rogers' consent to the recording of conversations with the defendants. The defense sought to introduce this letter for the additional purpose of affecting Rogers' credibility. In receiving it the court said at first that it was to be considered only as going to the question of Rogers' consent to recording conversations and as to whether Rogers was coerced by the campaign fund inquiry to make the recordings. The court did not instruct the jury, at least to the satisfaction of appellant Taylor, as to the

letter's bearing on the credibility of Rogers. However, the court did instruct the jury quite extensively on the subject of the credibility of Rogers as a witness and in our opinion this was sufficient. The jury was told that if they found that the recordings made by Rogers were voluntarily given that the jury could consider their contents as evidence in the case. The court went on to instruct the jury:

> Likewise evidence has been presented herein regarding a Department of Justice inquiry into the knowledge of the witness John Rogers about a "Special Campaign Fund" in the Office of the Oklahoma State Examiner and Inspector.
>
> The jury may consider this evidence as the same may or may not in the judgment of the jury have affected the voluntariness of the consent of the witness John Rogers to the interception of oral and telephone communications to which he was a party and which conversations were recorded on tape.
>
> The jury may also consider this Department of Justice inquiry as it may or may not in the judgment of the jury have brought about any bias or prejudice on the part of the witness John Rogers for or against any party to this litigation.

Having instructed the jury fully about the problem of Rogers' credibility as it might have been affected by the relationship with the federal government, we are unable to see that the failure to specifically mention the letter could be significant. Taylor's possible bias, prejudice and coercion were brought to the jury's attention.

We disagree with the argument that Taylor was unduly limited in the treatment of this letter. Taylor's counsel was allowed to cross-examine Rogers at length and in a manner

which would test his credibility as a witness by reason of his cooperation with the federal government as it might have been affected by his being the subject of an inquiry.

The court was not restrictive in its charge to the jury as Taylor would have us believe. Rogers was not only cross-examined extensively but the issue was finally argued without visible restriction.

In reviewing a question such as this, it is not a matter of whether the defendant was given an instruction in the exact form requested.[15] Rather, the concern is whether his rights were recognized in the court's rulings and in the court's instructions. Considering the transaction in its entirety, and the fact that the trial court modified its original ruling limiting the use of the letter, we are of the opinion that appellant Taylor was not prejudiced.

There is a failure to show that the disputed issues were withheld from the jury. The court's general instructions with respect to Rogers' collateral problems and the court's general instructions on self-interest and impeachment as being proper subjects for jury consideration brought to the attention of the jury the issue of Rogers' credibility. The failure of the court to single out the letter in connection with its charge on credibility of witnesses does not in our judgment constitute error.

---

15. *See* United States v. Waters, 461 F.2d 249, 251 & 251n.6 (10th Cir.), *cert. denied, sub nom.* Robins v. United States, 409 U.S. 880 (1972).

Appendix A

B. Whether the trial judge adequately instructed on Taylor's theory of the case

Appellant Taylor's argument with respect to the failure of the court to submit his theory of the case pertains to his contention that he acted in good faith and in compliance with Oklahoma law and, therefore, the requisite specific intent required under 18 U.S.C. Section 1952, the Travel Act, was lacking. Appellant's requested instructions read as follows:

"VII.

It is necessary for the Government (Plaintiff) to prove that the Defendant knew that his act or acts were in violation of the law of State of Oklahoma as such law has been defined to you. Evidence that an accused acted or failed to act because of ignorance of such law is to be considered by the jury, in determining whether or not the accused acted intending with bad purpose to obey or to disregard the law of Oklahoma (Section 13.04, Devitt & Blackmar, as modified for this case; *United States* v. *Stagman* (6th Cir., 1971), 446 F.2d 489, 491)."

"IX.

GOOD FAITH COMPLIANCE WITH STATE LAW.

You are instructed that while generally ignorance of the law is no defense, where there is evidence of an attempt at good faith compliance with state law such as the law of Oklahoma pertaining to bribery, based upon representations by a principal public official of the State of Oklahoma such may be considered by the jury as to such defendant receiving such representations in determining whether or not the accused acted with specific intent to disobey or to disregard the state law.

Appendix A

(*United States* v. *Stagman* (6th Cir., 1971), 446 F.2d 489)."

"XX.

It is no defense that the offer or promise of money or thing of value was made to the public official with the intent to corruptly influence an official act which is lawful, or even desirable or beneficial to the public welfare, although you may consider the lawfulness, desirability, or benefits to the public welfare, as any other circumstances in the case as it may bear upon the specific intent of a Defendant or his purpose of traveling in or using interstate commerce facilities."

In urging good faith belief in the state law as a defense, Taylor relies on United States v. Stagman, 446 F.2d 489 (6th Cir. 1971), wherein the defendant, the operator of a bingo game, had been informed by the Sheriff, Deputy Sheriff and an Assistant Commonwealth Attorney of the county where the game was operated that such games were legal if certain rules were followed. The Sixth Circuit there held that he was entitled to a charge which stated that a finding of specific intent was essential to a verdict of guilty under the Travel Act. It is relevant to consider that during the period of negotiations between Hall, Taylor and Rogers, Taylor received a warning from a co-conspirator that the payments were illegal. Taylor maintains that he inferred from the warning that offers to pay as opposed to making payments were not in violation of the law, but no direct statement to this effect was testified to, so even if we were to follow the decision in *Stagman* it would not call for a good faith instruction in the present case. The trial court's instructions were adequate.

The answer to all of this is that the jury was charged that the government was required to prove specific intent as an element and that this meant more than general intent; further, it was told that the government must prove that the accused knowingly acted with intent to promote or to carry on or facilitate the promotion and carrying on of the activity of bribery of John Rogers, an Oklahoma public officer, an activity which the accused knew to be unlawful under Oklahoma law, such intent being determined from all of the facts in the case. A further instruction told the jury that an act of bribery is not excused by evidence tending to show that the objectives sought by the bribe may have been desirable or beneficial to the public welfare and that the purpose of the state law making it a crime to bribe a public official is protection of the integrity of acts of public officials against the temptation of an offer or promise of anything of value to influence their official acts.

We recognize that defendant's theory of the case should be presented so long as it states the law accurately and does not appear confusing to the jury. *Cf.* United States v. Von Roeder, 435 F.2d 1004 (10th Cir. 1971); Beck v. United States, 305 F.2d 595 (10th Cir. 1962). Also, even when charging the jury as to the defendant's theory of the case, the exact language offered by the defendant need not be followed. *See* Elbel v. United States, 364 F.2d 127 (10th Cir. 1966).

The instructions here were sufficient and comprehensive. They correctly stated the law with respect to both belief and specific intent.

The judgments of the district court are affirmed.

APPENDIX B

10th Circuit Court of Appeals Decision on Motion for Rehearing

[*Entered June 8, 1976*]

MAY TERM—June 8, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

No. 75-1358

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DAVID HALL,
Defendant-Appellant.

No. 75-1359

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

W. W. TAYLOR,
Defendant-Appellant.

Appendix B

This matter comes on for consideration of the petitions for rehearing with suggestions for rehearing en banc filed by appellants in the captioned cause.

Upon consideration whereof, the petitions for rehearing are denied by Senior Judge Breitenstein and Circuit Judges McWilliams and Doyle to whom the case was argued and submitted.

The petitions for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petitions for rehearing are denied. Holloway, Circuit Judge, did not participate.

/s/ HOWARD K. PHILLIPS

HOWARD K. PHILLIPS
Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By

/s/ LINDA A. HALL
Deputy Clerk

APPENDIX C

Order of United States District Court of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
APR 24 1975
REX B. HAWKS
Clerk, U. S. District Court
By: VERA EDDELMAN
Deputy

Case No. 75-8 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID HALL and W. W. TAYLOR,

Defendants.

The Court has under consideration Motions of Defendants Hall and Taylor To Interview the Jurors and Motions For Judgment Of Acquittal Notwithstanding The Verdict and Motion For New Trial. Supporting Briefs accompany the Motions. The Plaintiff has responded to said Motions. With leave of Court said Defendants have each filed a Reply to Plaintiff's Response.

Motion to Interview Jurors

These Motions and Supporting Briefs are identical. The Jury by unanimous verdicts convicted the Defendant Hall of Counts I (Extortion), II (Conspiracy), III and IV (Travel Act) and Defendant Taylor of Counts II (Conspiracy), V and VI (Travel Act) of the Indictment. Each defendant was convicted of all counts of which he was charged. Local Rule 29(B)5 provides:

Appendix C

". . . lawyers appearing in this Court shall:

5. Refrain from approaching jurors who have completed a case unless authorized by the Court."

Said Defendants by their Motions desire to, "interview the members of the jury to determine whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror", or, "whether or not all jurors were able to physically or mentally function in a normal way and under no physical or mental impairment," by any of which they may have been deprived of a fair and impartial trial by jury.

Said Defendants do not allege *what* "extraneous prejudicial information" or *what* "outside influence" was improperly brought to bear on any juror. As to "whether or not all of the jurors were able to physically and mentally function in a normal way" the Defendants in their Briefs mention only juror Dell Meyer and say that her illness "could have impaired the jury in its deliberations." In their Reply Briefs said Defendants attach newspaper articles, transcripts of television appearances and other information which is outside the record.

In *United States* v. *Crosby,* 294 F. 2d 928 at 950 (Second Cir. 1961), cert. den. 368 U.S. 984 (1962) the Court said:

> "There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not to be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real

merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain."

In *United States* v. *Miller*,[1] 284 F. Supp. 220 (D. Conn. 1968) the Court held:

> "To maintain the integrity of our jury system for reaching final decisions requires that its internal process shall be inviolable, even in court proceedings. Any inquiry outside that area which may be permitted of them ought be adequately restricted to safeguard that integrity.
>
> * * *
>
> ". . . Leaving jurors at the mercy of investigators for both sides to probe into their conduct would make the already difficult task of obtaining competent citizens willing to serve as jurors well nigh impossible. In this case, the whole purpose of the jury investigation conducted by the defendants was to rake up the past in an effort to find some basis for reading into it some features which the defense would like to stress on another motion for a new trial."

The Court has an obligation to the members of the jury in this case to safeguard them from harassment and annoyance and to afford them deserved protection after they have faithfully and conscientiously discharged their duties in an unpleasant and disheartening trial of more than usual duration. As said Defendants cite no "extraneous prejudicial information" or "outside influence" having been improperly brought to the jury's attention, the Court declines, in its discretion, to grant the desired interviews

1. The Court of Appeals held that the Trial Court properly enjoined the Defendant, defense counsel and an investigator from making an inquiry of jurors. See *Miller* v. *United States*, 403 F. 2d 77 (Second Cir. 1968).

of the trial jurors on these assertions—interviews which are obviously sought for the purpose of browsing among the thoughts of the members of the jury—interviews which would amount to a pure fishing expedition inspired by adverse verdicts of conviction. The Defendants cite no authority that permits such an excursion unsupported at the outset by any allegation of impropriety. The record will reveal that the Court meticulously and repeatedly instructed the jury against any such impropriety and further implicitly and repeatedly charged the jury to report any such violation to the Court at their earliest opportunity. No report was made. The fishing expedition desired by the Defendants has been condemned as being useless and harmful to the jury system. *United States* v. *Hohn*, 198 F. 2d 934 (Third Cir. 1952);[2] *Dickinson* v. *United States*, 421 F. 2d 630 (Fifth Cir. 1970);[3] *United States* v. *Blackburn*, 446 F. 2d 1089 (Fifth Cir. 1971).[4] The cases cited by the

2. This Court said:

". . . But we wish to make plain that we join the court below in disapproving in general the practice of interviewing a juror after a trial as to his state of mind during the trial. There may conceivably be special circumstances which could justify such a course but we do not find them here."

3. This Court said:

". . . The jury should not be exposed to post-verdict fishing expeditions into their mental processes with the hope that something will turn up."

4. This Court said:

". . . Defendant's argument that the trial court abused its discretion by refusing to inquire into the deliberations of the jury is without merit. The record is barren of any showing of juror misconduct. In any event, the jury's verdict of guilty cannot be impeached by the fact that a juror may have been influenced by the improper remark of a fellow juror. Klimes v. United States, 1959, 105 U.S.App.D.C. 23, 263 F.2d 273. 'The jury should not be exposed to post-verdict fishing expeditions into their mental processes with the hope that something will turn up.'"

Appendix C

Defendants are not in any way relevant to this case on the facts or in the light of their Motions.[5]

As to the physical and mental condition of juror Meyer, the Court, at the request of the Defendants, has already inquired into this in an evidentiary proceeding. On the afternoon of March 14, 1975 while jury deliberations were underway, the Court, at the request of the Defendants, conducted an evidentiary hearing in chambers and removed from press and public, all at the request of the Defendants, in which sworn testimony was heard from the two doctors who had ministered to this juror during her brief illness that morning, an illness finally diagnosed to be caused by arthritis and nervous tension.

Prior to hearing the testimony of the doctors, it was necessary to obtain the waiver of this juror of the doctor-patient privileged relationship. This was accomplished in a procedure approved by the Defendants. In obtaining her execution of such waivers (prepared by the Defendants) the juror was brought to chambers by a bailiff, the desire to question her doctors about her illness and the need for the

5. The cases cited by Defendants hold that an accused is entitled to an impartial and unbiased jury who shall base their verdict on the facts and the instructions of the Court; that conclusions reached will be induced only by evidence and arguments and not any outside influence; that books or newspaper articles should not be brought into the jury room; that third parties should not make statements to the jury; that a jury should not be subjected to serious inconvenience and stress by the Court; that a bailiff should not tell the jury that the defendant is guilty or that this was the third fellow the defendant had killed or read a newspaper article about the case to the jury and that an attempt to bribe a juror is prohibited. These cases recite well recognized principles but factually they are inapplicable to the situation at hand.

waivers were explained to her by the Court, she stated that she understood the matter and she executed the waivers. This afforded the Court an opportunity to observe the juror as well as converse with her. She appeared alert and responsive and nothing unusual was observed by the Court about her mental or physical condition.[6] She did not complain about her condition.

It should be noted that prior to this evidentiary hearing, the Court had directed the jury to convene at 1:30 p.m. on March 14, 1975 for a continuation of its deliberations. This was done with the approval of this juror's personal physician who had just examined her that morning and who related to the Court that the juror had told him she felt she could continue with her jury work at 1:30 p.m. that day. Thereupon, this doctor discharged her from the hospital at 11:00 a.m. This decision made about 11:00 a.m. that the jury resume deliberations at 1:30 p.m. was thus made by the Court on the advice of this juror's personal doctor and her own statement of readiness to resume jury deliberations at 1:30 p.m.

The evidentiary hearing thereafter conducted at Defendants' request explored the matter of this juror being able to render satisfactory jury service by receiving the sworn expert medical testimony of the doctors who at-

6. In *United States* v. *Dioguardi*, 492 F. 2d 79 (Second Cir. 1974) the Circuit Court relied on the trial Judge's observation that the juror involved (said to have infirmities which might have rendered her unable to comprehend the proceedings at trial) "alert and responsive and he noted nothing unusual about her". The Court held in these circumstances that it was unnecessary to hold an inquiry into the jurors' competence.

tended her that morning, following which hearing the Court made the decision on the evidence before the Court that the juror could render satisfactory jury service and declined to declare a mistrial as requested by the Defendants.[7]

Thus, the Court first directed the jury to resume its deliberations at 1:30 p.m. on medical advice and advice from the juror herself that she was ready to resume her jury work and then, at the request of Defendants, conducted an evidentiary hearing in which the two doctors involved gave sworn testimony about her condition from which the Court made the further determination and decision that this juror was capable of performing satisfactory jury service at that time and that a mistrial should not be declared as requested by Defendants.

As the Court has already conducted an evidentiary hearing on the ability of juror Meyer to render satisfactory jury service on March 14, 1975 (she being the only juror mentioned by Defendants as possibly having a physical or mental condition which could have impaired the jury) and at the conclusion thereof made an informed judicial decision that she was capable of rendering satisfactory judicial service, the Court, in its discretion, declines to retry the matter. In this connection, it is recognized that juror Meyer may not impeach her verdicts. *McDonald* v. *Pless,* 238 U.S. 264, 35 Sup.Ct.Rep. 783, 59 L.Ed. 1301

7. The Defendants refused to drop this juror as permitted by Rule 23(b), Federal Rules of Criminal Procedure. Thus, they would not proceed with and they would not proceed without this juror. Their desire was a mistrial.

(1915). Hence, an interview of this juror bringing forth a desire on her part to impeach her verdicts may not be considered by the Court.

Therefore, as said Defendants cite no extraneous prejudicial information or no outside influence to which the jury was allegedly exposed and as the Court has already conducted an evidentiary hearing and made a judicial decision that juror Meyer was able to render satisfactory jury service at the time and as this juror may not attempt to impeach her verdicts, the Court should deny Defendants' Motions to Interview The Jurors.

Motions for Judgment of Acquittal Notwithstanding the Verdict

Such a motion is governed by Rule 29, Federal Rules of Criminal Procedure. This rule generally provides that after a jury returns a verdict of guilty, the Court may set aside the verdict and enter a judgment of acquittal, "if the evidence is insufficient to sustain a conviction of such offense or offenses." These Motions are not in compliance with Local Rule 13(e) as they do not set out with particularity the grounds therefor and are not accompanied by a concise brief[8] citing all authorities upon which the Movant relies. Defendant Taylor desires to rely on his Motion for Judgment of Acquittal made at the close of all the evidence at the trial. This, of course, is not in compliance with the

8. Local Rule 13(e) provides in pertinent part:

"... Motions in criminal cases ... shall be in writing and state with particularity the grounds therefor and the relief or order sought .... All motions must be accompanied by a concise brief citing all authorities upon which the movant relies."

language and intent of Local Rule 13(e). Rule 29, Federal Rules of Criminal Procedure and Local Rule 13(e) are intended to allow a defendant to present a motion for judgment of acquittal notwithstanding the verdict to the Court in depth and detail after the stress of the trial is over and upon research and careful reflection of what transpired at the trial.

The Court could decline to entertain these Motions in the foregoing circumstances. However, as neither Defendant, in the opinion of the Court, was entitled to a judgment of acquittal as to any count in which he was charged at the close of all the evidence, the Court will again rule that the evidence was sufficient to sustain a conviction of Defendants Hall and Taylor of each count of which they stood charged.

In considering a motion for judgment of acquittal the trial court must consider the evidence in the light most favorable to the prosecution in determining whether there is substantial evidence from which a jury can find a defendant guilty as charged beyond a reasonable doubt. *United States* v. *Mallory,* 460 F. 2d 243 (Tenth Cir. 1972) cert. den. 409 U.S. 870; *Harris* v. *United States,* 441 F. 2d 1333 (Tenth Cir. 1971); *Speers* v. *United States,* 387 F. 2d 698 (Tenth Cir. 1967) cert. den. 391 U.S. 956.

The evidence of the Government established that Defendant Taylor developed a plan to sell $10,000,000.00 in promissory notes of a newly created corporation to be secured by Government guaranteed collateral to the Oklahoma Public Employees Retirement System (System).

Appendix C

Defendants Hall, Taylor and Mooney met in the Governor's Mansion and discussed this plan. Defendant Hall arranged for the plan to be presented to the Director of the System. Thereafter on December 2, 1974 Defendant Hall through Mooney (who had brought Taylor and Hall together) demanded $100,000.00 for getting the Taylor plan approved by the System, which sum he and Mooney would divide. Taylor agreed to this payment. Hall then contacted John Rogers, Oklahoma Secretary of State, and Chairman of the Board of Trustees of the System and told him there was $50,000.00 in it for them if the Taylor plan was approved by the Board of the System. Hall said that the $50,000.00 was to be divided between Rogers and Hall. Hall then told Mooney that he would have to pay one half of the $25,000.00 to be paid to Rogers. Thereafter Hall had numerous contacts with Rogers and several members of the Board of Trustees of the System all aimed at getting the Taylor plan approved by the Board of the System. Hall was not a member of the Board but several of its members were his appointees and he was then Governor of the State of Oklahoma. Hall importuned these members of the Board to approve the Taylor plan. The Board on December 23, 1974 did approve the Taylor plan subject to a letter of legality from the Attorney General and a letter of approval from the Investment Counsellor of the Board. Thus, the Government's evidence was that Hall attempted to induce Taylor to pay the said $100,000.00, with Taylor's consent, under color of official right by virtue of Hall's official position as Governor of Oklahoma to bring about the approval of the Taylor plan by the System; that Hall, Taylor and Mooney conspired and committed overt acts in

furtherance of said conspiracy to violate the Federal Travel Act by traveling and using facilities of interstate commerce to promote or carry on or facilitate the promotion or carrying on of the unlawful activity to bribe John Rogers, a public officer of the State of Oklahoma, by paying him $25,000.00 (later increased to $31,250.00 due to a more favorable rate of interest to Taylor) to obtain approval of the Taylor plan by the Board of the System of which he was Chairman; that both Hall and Taylor traveled and used facilities in interstate commerce with specific intent to further the unlawful activity of bribery of Rogers, a public officer of the State of Oklahoma, and following such interstate travel and use of interstate facilities they performed or attempted to perform an act to promote or carry on the unlawful activity of bribery of said Rogers to influence him in his official duties as Chairman of the Board of the System and that as to all counts Hall and Taylor acted knowingly and willfully and where required the involvement of commerce was shown by the evidence to be present. The evidence of the Government was sufficient to prove each of the essential elements of each of the counts as to the Defendant or Defendants named therein on trial before this Court and Jury.

Suffice it to say that the evidence of the Government was sufficient to sustain a conviction of each offense charged beyond a reasonable doubt as to both Defendants Hall and Taylor. Both Motions For Judgment Of Acquittal Notwithstanding the Verdict should therefore be overruled.

Appendix C

Motion for New Trial

Defendant Hall moves for a new trial on seventeen grounds. But only ground XVI is briefed. Defendant Hall has therefore again failed to comply with Local Rule 13(e), *supra*. In these circumstances the Court will merely observe that the unbriefed grounds are essentially bald conclusions and are deemed to be wholly lacking in merit. The Court is of the opinion that the verdicts are sustained by sufficient evidence, are not contrary to the law and are not contrary to the Court's instructions. The Court is aware of no errors of law occurring during the trial. The Court's rulings regarding the sequestering of the jury are believed to have been proper in the exercise of the Court's discretion. No grounds for mistrial occurred during the trial and the Court's rulings on the evidence are believed to have been correct—if not, Defendant Hall now points to no prejudice therefrom. The Defendants had a fair trial and no irregularities during the trial are known to the Court. The Court's instructions are believed to have correctly embodied the applicable law of this case when viewed in the light of the Indictment, the applicable criminal statutes and the evidence. The Court properly exercised its discretion and authority in impaneling the jury under Rule 24, Federal Rules of Criminal Procedure, and afforded the Defendants the opportunity to suggest additional questions or further inquiry, to be submitted to the jurors by the Court, if they desired. In addition, proposed questions for the jurors were presented by defense counsel to the Court which were substantially utilized by the Court in its exam-

ination of the jurors. The Court did not err in overruling this Defendant's Motion For Judgment Of Acquittal for the reasons heretofore set out. Finally, the Court is completely satisfied that Defendant Hall and as well his Co-defendant on trial each received a fair and impartial trial and none of their Constitutional rights were violated to the knowledge of the Court. The interests of justice do not require that a new trial be granted. As Defendant Hall's grounds for a new trial above treated with by the Court are conclusory and lack particularity and are not supported by a concise brief, the Court can only respond thereto in the same vein. It is felt that if Defendant Hall knows of any error of any magnitude to complain about he would certainly follow the rules of the Court and specify the same factually and submit supporting briefs thereon as required by the rules of the Court so that the trial court could fully consider and appropriately respond thereto.

Defendant Hall's ground XVI for a new trial (and the only ground covered by his brief) has to do with juror Meyer. The Court has previously alluded to the brief illness of this juror due to arthritis and nervous tension and the same is incorporated herein to avoid some repetition. This ground will hereinafter be further discussed.

Defendant Taylor moves for a new trial on only two grounds: (1) Error in the Court giving the instruction entitled "Agency", and (2) Juror Meyer allegedly being unable to render satisfactory jury service on or about March 14, 1975.

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The Agency Instruction

This instruction reads:

"AGENCY

"It is not necessary to prove that an accused personally did every act constituting the offense charged. As a general rule, whatever any person is legally capable of doing himself, he can do through another as his agent. So, if the acts or conduct of an employee or other agent are wilfully ordered or directed, or wilfully authorized or consented to by an accused, then the law holds the accused responsible for such acts or conduct the same as if personally done by the accused."

There is an abundance of evidence that Defendant Taylor ordered and directed Defendant Mooney (who plead guilty to Count II, the Conspiracy Count) to do many acts on his behalf with reference to the crimes charged against Defendant Taylor in Counts II, V and VI. Not only did Defendant Mooney so testify but Defendant Taylor admitted giving Mooney several orders and directions in connection with the activities involved in said Counts. As Defendant Taylor does not appear to contend otherwise on this point in his Brief and Reply Brief, the Court will not undertake to cite the testimony which reveals that Mooney acted on orders and directions from Taylor in connection with activities committed in relation to Counts II, V and VI. But, an example is the admission of Defendant Taylor that he ordered and directed Mooney to go to Oklahoma City from Texas on or about January 14, 1975 to obtain from Rogers the letter of commitment for the loan from the Sys-

tem which Rogers had earlier agreed by telephone with Defendant Taylor to give to Taylor.

Thus, the evidence in this case supports the giving of this instruction. Therefore, is the instruction a correct statement of the law? It comes from *Devitt & Blackmar, Federal Jury Practice & Instructions,* §11.12, a recognized and universally used authority on jury instructions in the Federal Courts. The last paragraph contained in *Devitt* was not included in the "Agency" instruction because the precise paragraph (defining willfully) had been previously given in the Court's instructions. It is not good procedure to repeat instructions and the Courts are cautioned against such conduct. *White Auto Stores* v. *Reyes,* 223 F. 2d 298 (Tenth Cir. 1955); *Laeoze* v. *United States,* 391 F. 2d 516 (Fifth Cir. 1968). As willfully applied to all six of the Counts in the Indictment and to all Defendants, it was given as a separate instruction shortly preceding the "Agency" instruction. Our Circuit has approved the content of this "Agency" instruction. *United States* v. *Pauldino,* 487 F. 2d 127 (Tenth Cir. 1973).

Apparently, Defendant Taylor would have the Court grant a new trial based on a post-verdict newspaper account of what one juror allegedly commented about this instruction and that somehow the instruction should therefore be found to be erroneous. First, Defendant Taylor cites no case to the effect that the content of this instruction is erroneous. Moreover, juror post-mortems on what an instruction means will not support the granting of a new trial. In *Young* v. *United States,* 163 F. 2d 187 (Tenth Cir. 1947) our Court of Appeals held that a juror cannot tes-

tify that while the substance of a verdict returned to Court was understood, it was predicated upon misrepresentation of the law. 8 *Wigmore, Evidence,* §2349, (McNaughton rev. 1961), states:

> "Accordingly, it is today universally agreed that on a motion to set aside a verdict and grant a new trial the verdict cannot be affected, either favorably or unfavorably, by the circumstances:
>
> that one or more jurors *misunderstood* the judge's *instruction;*"

Thus, it is believed that the "Agency" instruction correctly states the law, the evidence clearly supported the giving of this instruction in this case, in a separate instruction the Court defined "willfully" as that term was used in the "Agency" instruction and a juror's post-verdict comment or observation about the instruction will not support the granting of a new trial. In these circumstances the verdicts should not be set aside and a new trial granted on this ground.

Juror Meyer

When the entire jury panel for this term of Court was qualified by the Court, the jurors were asked by the Court if any was incapable by reason of mental or physical infirmity to render satisfactory jury service. They were further told that this condition would be a disqualification from jury service and that each juror had duty to advise the Court if he possessed this disqualifying condition. *Juror Meyer made no response.* When the jury was empaneled to try this case and before they were sworn the

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Court asked the jurors if any had a problem which would prevent him from sitting in this case for an estimated two or three weeks. *Juror Meyer made no response.* After the Court's instructions were read to the jury and before the two alternate jurors were discharged and when the jury was advised that it would be sequestered during its deliberations, the Court asked the regular jurors if any had a health problem or any other problem which would indicate that he should now drop out and allow an alternate juror to replace him. *Juror Meyer made no response.* Wednesday passed without incident. Late Thursday afternoon the Foreman of the Jury advised the Court that the Jury wished to recess until Friday morning; that one of the jurors was not feeling well. This juror turned out to be juror Meyer. Arrangements were made for this juror to consult that evening with her personal physician. It appears that he told her to take two valium tablets (5 milligrams each) at 6:00 p.m. and if she were still nervous about 9:00 p.m. to take another valium tablet (5 milligram) along with a sleeping pill. He also prescribed a laxative, as she was constipated. The next morning, upon arriving in chambers, the Court was handed a letter by a bailiff, which letter was signed by Doctor Kenneth N. Richtner, a resident physician at St. Anthony's Hospital in Oklahoma City. Juror Meyer had been taken, in the custody of bailiffs, to this hospital around 5:30 a.m. on March 14, 1975. At about 6:00 a.m. Dr. Richtner gave her 50 milligrams of demerol. Certain tests were made and he reported in his letter to the Court that this juror possibly had a myocardial infarction or a heart attack. At about 9:00 a.m. the Court presented this letter to the attorneys in the case. Discus-

sions were had back and forth in an informal way about proceeding with the remaining eleven jurors as permitted by Rule 23(b), Federal Rules of Criminal Procedure. The Plaintiff was agreeable and perhaps Defendant Taylor was agreeable but Defendant Hall was not agreeable to so proceed under this Rule. Later around 10:30 a.m. the Court was called by juror Meyer's personal physician who had just examined her in the hospital. He stated to the Court that the juror had not had a heart attack. Her problem was arthritis and nervous tension. After talking to the juror, the doctor advised the Court that she said she felt like resuming her jury work and that she could resume deliberations at 1:30 p.m. that day. Accordingly, her personal physician discharged her from the hospital at 11:00 a.m. He had previously prescribed a 5 milligram valium tablet for the juror to be taken at 12:00 noon. She had lunch with the other jurors at the hotel and all resumed deliberations at 1:30 p.m.

Both doctors testified at the hearing before the Court that the demerol given the juror at around 6:00 a.m. would wear off in 4 to 6 hours. This medicine, they advised, is to relieve pain. The doctor who administered the demerol testified:

> "The Court: Did you administer any medications to her this morning that would impair her mental faculties or thinking process as of 1:30 today?
>
> The Witness: I believe not.
>
> The Court: Did you observe or find or see anything that, in your opinion, would impair her mental process as of 1:30 today?
>
> The Witness: I believe not."

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Her personal physician testified that valium relaxes nervousness and relaxes muscle tension and that the valium would definitely help this juror's nervousness and tension. Also this doctor testified that, "She stated to me that the valium was helping her to relax and be more collected." This doctor also testified that valium is prescribed for ordinary business people to take during their work in a business day and that he had prescribed valium for this juror in the past. This doctor testified that when he saw her about 11:00 a.m., "she was rather relieved, she seemed clear of mind then . . .". He also testified that he, "accepted the consent form" juror Meyer had signed, "with the assumption that she was clear of mind."

After observing the juror and receiving the sworn testimony of the two doctors involved (all at the Defendants' request) the Defendants then renewed or continued to assert their motions for a mistrial on the basis that juror Meyer was not capable of performing satisfactory jury service. Earlier discussions about proceeding with eleven jurors were concluded on the basis that both Defendants were not agreeable to so proceeding though expressly permitted by the Federal Rules.

In these circumstances, the Court was confronted by the events at hand and the Defendants' motions for a mistrial with the necessity to make a judicial determination as to the ability of juror Meyer to render satisfactory jury service at and after 1:30 p.m. on March 14, 1975. From observing the juror and on the highly reliable medical record before the Court and having been informed that the

juror herself stated she was ready to resume jury deliberations, the decision was not in any way difficult for the Court. The Court determined on the record before it that the juror was capable of rendering satisfactory jury service and the defense motions for a mistrial on the basis that she was not so capable were overruled.

The jury returned verdicts finding Defendant Hall guilty of the four counts of which he was charged and Defendant Taylor of the three counts of which he was charged. The Court inquired of the jurors if their seven verdicts of guilty, as read in open court, were the verdicts of each and every member of the jury and advised the jury that if they were not the verdicts of each and every member of the jury that it was the duty of a juror to then so advise the Court. No juror advised the Court that the seven verdicts of guilty as read in open court were not their individual verdicts. The Court then had the attorneys examine the seven verdicts as well as the unused verdict forms and inquired of them if there was anything further before the Court discharged the jurors from further participation as jurors in this case. The Court also inquired of the attorneys if they wanted the jury individually polled by the Court. The suggestion of individual polling was declined by all attorneys and the attorneys requested nothing further and agreed to the discharge of the jurors forthwith.

By their Motions and by the newspaper articles, transcripts of television appearances and certain documents attached to their Reply Briefs, all of which attachments are outside the record of the Court, the Defendants desire

that juror Meyer be permitted to impeach her seven verdicts of guilty. As heretofore mentioned the United States Supreme Court in *McDonald* v. *Pless, supra,* stated that a juror is not permitted after returning a solemn verdict in open court to thereafter impeach the same. Sixty years ago the United States Supreme Court said in *McDonald* v. *Pless, supra*:

> "... But let it once be established that [if] verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and [then] all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."
>
> • • •
>
> "... And, of course, the argument in favor of receiving such evidence is not only very strong, but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious acts and tampering with jurors.' 'The prac-

> tice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.' "

Even earlier in *Mattox* v. *United States,* 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892) the United States Supreme Court said that evidence of jurors as to the motives or influences which affected their deliberations is inadmissible to impeach or to support their verdict. This rule of law has been universally followed through the years in countless decisions. Our Circuit has embraced the rule in *Castleberry* v. *NRM Corporation,* 470 F. 2d 1113 (Tenth Cir. 1972); *Johnson* v. *Hunter,* 144 F. 2d 565 (Tenth Cir. 1944) and in *Young* v. *United States, supra.*[9] Were this not the law, the solemn verdict of a jury publicly returned in open court would more often than not become a worthless piece of paper. Any other rule of law would do violence to our sacred institution of jury trials. Public policy supports this rule of law. Were this not the law, there would be no finality in the verdict of a jury. The return of a jury verdict of guilty would become the signal for more litigation as a result of activities of those, such as disappointed litigants and those aligned with them or their cause, who would tamper with members of the jury in an effort to defeat the verdict of jurors sworn to decide a case on the basis of the evidence and the law presented to them in the Courtroom. Our juries are universally instructed that they

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9. Other Circuits have followed this Rule: See *Cunningham* v. *United States,* 356 F. 2d 354 (Fifth Cir. 1966); *Complete Auto Transit, Inc.* v. *Wayne Broyles Eng. Corp.,* 351 F. 2d 478 (Fifth Cir. 1965); *United States* v. *Chereton,* 309 F. 2d 197 (Sixth Cir. 1962); *Klimes* v. *United States,* 263 F. 2d 273 (D.C. D.C. 1959); *Stephens* v. *City of Dayton, Tennessee,* 474 F. 2d 997 (Sixth Cir. 1973) and *Miller* v. *United States,* 403 F. 2d 77 (Second Cir. 1968).

have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. They are told that each juror must decide the case for himself but only after an impartial consideration of the evidence with his fellow jurors. Further, that a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous. Our Circuit has approved this instruction. *United States* v. *Wynn,* 415 F. 2d 135 (Tenth Cir. 1969). Jurors are expected to argue the case pro and con in their secret deliberations. A jury is made up of different people, no two having the same education, intelligence, background, character and moral responsibility. Their experience varies as does their sex and age and color. All have different strengths and weaknesses of body and mind. All of which contribute to the proposition of a trial by a jury of one's peers.

It is stated in 8 *Wigmore, Evidence,* §2349 (McNaughton rev. 1961):

> "Accordingly, it is today universally agreed that on a motion to set aside a verdict and grant a new trial the verdict cannot be affected, either favorably or unfavorably, by the circumstances:
>
> * * *
>
> or were influenced by an *illegal paper* or by an *improper remark* of a fellow juror;
>
> or *assented* because of *weariness* or illness or importunities;"

The American Bar Association's Standards Relating to the Administration of Criminal Justice, Trial by Jury, §5.7 states:

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> "(a) Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror concerning the mental processes by which the verdict was determined."

The New Federal Rules of Evidence, soon to become effective, provide in Rule 606(b):

> "A juror may not testify as to any matter or statements occurring during the course of the jury's deliberations or to the effect of anything upon his or other jurors' minds or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith."

Therefore, the Court may not permit juror Meyer to now impeach her seven verdicts of guilty solemnly returned in open court and defeat what has been a fair and impartial trial for all concerned culminated by verdicts amply supported by the evidence.

Defendants urge that Governmental counsel, because of the preparation on the morning of March 14, 1975 of a Stipulation to proceed with eleven jurors in view of the letter of Dr. Richtner, has admitted that juror Meyer had become physically incapacitated. Defendants refer to Rule 11, Federal Rules of Civil Procedure which has to do with the signing of pleadings in a case. Defendants assert this Stipulation was drawn during the evidentiary hearing at which the two doctors testified. In this they are incorrect, and no doubt on reflection they will recognize the error of this assertion. The Stipulation was prepared in connection with the informal discussions begun around 9:00 a.m. be-

tween the attorneys and the Court, when all we then knew was the contents of the letter from Dr. Richtner that juror Meyer possibly had a heart attack. Rule 23(b), Federal Rules of Criminal Procedure, requires a *written* stipulation *with the Court's approval* before a jury may consist of less than twelve members. A stipulation is an agreement between counsel with respect to business before a court and it is essential that it be assented to by the parties or their representatives. 83 CJS, Stipulations, §§1 and 3, pages 2 and 3. This Stipulation was only signed by the United States Attorney. It was not assented to or signed by the Defendants or their attorneys: At the time Government Counsel prepared the same, it was not known that juror Meyer had not in fact, suffered a heart attack. An inquiry from the Court during the discussions of the morning of March 14, 1975 brought the decision from Defendant Hall, that he would not agree to a jury of less than twelve. This took place before the Court was called by Dr. Sanbar, and informed by him that juror Meyer had not had a heart attack, and that she said she felt like resuming jury deliberations at 1:30 p.m. that day. The document was not approved by the Court as required by the controlling Rule. It could not be a valid stipulation in this case until all assented to and signed the same and in this instance approved by the Court, following which it would have been filed with the Clerk of the Court. The prepared stipulation was not so assented to, it was not signed by Defendants or their representatives, nor was it approved by the Court or filed in the case. The matter of proceeding with eleven jurors was discarded with the decision by Defend-

ant Hall that he would not agree to proceed with eleven jurors and thereafter was a forgotten matter when the Court received the information from Dr. Sanbar shortly before 11:00 a.m. that juror Meyer had not had a heart attack and was ready to resume jury deliberations. The document was not mentioned in the afternoon evidentiary hearing which began after the jury had started deliberations at 1:30 p.m. The efforts of defense counsel to claim an admission of juror incapacitation by the Government in these circumstances is wholly lacking in any merit whatsoever.

In view of the foregoing and as it is well settled that motions for new trial are not favored and should be granted only with great caution,[10] the Court should deny the Motions of Defendants Hall and Taylor for a new trial.

It is so ordered this 24th day of April, 1975.

/s/ Fred Daugherty

Fred Daugherty
United States District Judge

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10. See *United States* v. *Costello*, 255 F. 2d 876 (Second Cir. 1958), cert. den. 78 S.Ct. 1385, 357 U.S. 937, 2 L.Ed. 2d 1551, reh. den. 79 S.Ct. 16, 358 U.S. 858, 3 L.Ed. 2d 93; *United States* v. *Johnson*, 327 U.S. 106, 66 S.Ct. 464, 90 L.Ed. 562; *Weiss* v. *United States*, 122 F. 2d 675 (Fifth Cir. 1941) cert. den. 314 U.S. 687, 62 S.Ct. 300, 87 L.Ed. 550; *United States* v. *Mayersohn*, 452 F. 2d 521, 536 (Second Cir. 1971) and *United States* v. *Trudo*, 449 F. 2d 649, 653 (Second Cir. 1971).

APPENDIX D

Order Denying Motions to Dismiss of Defendant David Hall

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 75-8-CR.

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID HALL, W. W. TAYLOR, and R. KEVIN MOONEY,

Defendants.

The defendant, David Hall, first moves the court to dismiss count 1 of the Indictment for the failure to state factual elements sufficient to establish a violation of 18 U.S.C. §1951 as it purports to do. Specifically, he contends that the count is defective because it does not allege he "actively induced the payment of money to him by those making the payments".

The test of sufficiency of an indictment is that "it contains 'the elements of offense intended to be charged and must be sufficient to apprize the accused of the nature of the offense so that he may adequately prepare a defense'."

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United States v. *Mason,* 440 F.2d 1293, 1296 (CA10 1971), cert. denied 404 U.S. 883. It has been further stated:

> "The sufficiency of indictment must be determined on the basis of practical rather than technical considerations and the validity of attacks on them must be considered from a broad and enlightened standpoint of right reason rather than from a narrow view of technicality and hairsplitting." Robbins v. United States, 476 F.2d 26, 30 (CA10 1973).

There are two essential elements giving rise to a violation of the Hobbs Act: Interference with commerce and extortion. *Stirone* v. *United States,* 361 U.S. 212 (1960). Applying the definition of extortion contained in the statute the elements may be enlarged in this manner: (1) interference with interstate commerce (2) obtaining or attempting to obtain, or conspiring to obtain property from another, (3) with his consent, (4) induced by wrongful use of actual or threatened force, violence, or fear or under color of official right. *United States* v. *Howell,* 353 F. Supp. 419 (W.D. Mo. 1973). Only the sufficiency of the allegations to establish the fourth element is questioned here. The defendant apparently assumes that it is necessary to allege that he used or threatened force, violence or fear to induce the payment of money. This construction of the statute ignores its disjunctive language and fails to distinguish extortion by private individuals and extortion by public officials. The distinction is pointed out in *United States* v. *Kenny,* 462 F.2d 1205, 1229 (CA3 1972), cert. denied 409 U.S. 914:

> ". . . But while private persons may violate the statute only by use of fear and public officials may

violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right. The term 'extortion' is defined in §1951(b)(2):

> 'The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.'

The 'under color of official right' language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official and which did not require proof of threat, fear or duress."

In *United States* v. *Braasch,* 505 F.2d 139, 151 n.8 (CA7 1974) the court commented:

> "It may be true that duress is an essential element of a case prosecuted under the provision of the Hobbs Act relating to 'wrongful use of actual or threatened force, violence, or fear', but coercive extortion is not the only type outlawed by the Act. The other is inducing payoffs 'under color of official right'; and that offense does not require proof of coercion."

In pertinent part count 1 alleges the attempt to obtain money "which money was not due him from W. W. Taylor, R. Kevin Mooney and/or G.I.C., with the consent of said persons and/or corporation, induced under color of official right, that is to say to obtain said money by virtue of the defendant's position as Governor of Oklahoma." This alleges the inducement of a payment under color of official right. The motivation for the payment was for the Governor to use his power to influence the actions of certain

members of the Board of Trustees of the Oklahoma Public Employees Retirement System. It focused upon the office of the Governor and the acts that defendant Hall was to perform were to be undertaken in his official position. The defendant Hall was allegedly using his office to attempt to obtain the payment of money to him and such conduct constitutes a violation of the statute. In *United States* v. *Braasch,* id. at 151 it is stated:

> ". . . The use of office to obtain payments is the crux of the statutory requirement of 'under color of official right', and appellants' wrongful use of official power was obviously the basis of this extortion. See United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974). It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951. That such conduct may also constitute 'classic bribery' is not a relevant consideration."

Count 1, therefore, sufficiently alleges the elements of the offense intended to be charged.

The defendant's second Motion to Dismiss is directed at counts 2, 3 and 4 of the Indictment. The first theory propounded is that "said Indictment is fatally inconsistent in that it alleges a set of facts in count I that provide a complete legal defense for defendant Hall as to all subsequent counts." Hall is named in the first four counts of the Indictment. As noted above the first count charges

attempted extortion of money from Taylor and Mooney. Count 2 charges a conspiracy by Hall, Taylor and Mooney in violation of 18 U.S.C. §371. The object of the conspiracy is to violate 18 U.S.C. §1952 by interstate travel and the use of interstate communication facilities with intent to promote and carry on an unlawful activity. The unlawful activity is described as a scheme to bribe Oklahoma officials in violation of 21 O.S. §381 and for them to accept the bribe in violation of 21 O.S. §382. Twenty-one overt acts in the furtherance of the conspiracy are detailed. Count 3 charges defendant Hall alone with a substantive violation of 18 U.S.C. §1952 by making an interstate telephone call from San Diego, California, to John Rogers in Oklahoma City to promote and carry on an unlawful activity. Specifically the unlawful activity intended in this count is to bribe John Rogers in violation of 21 O.S. §381 and facilitate the acceptance of a bribe by the defendant David Hall in violation of 21 O.S. §382. Count 4 makes the same allegations with respect to a telephone call from Salt Lake City, Utah to John Rogers in Oklahoma City, Oklahoma.

Apparently it is defendant Hall's theory that somehow it is inconsistent for the him to attempt to extort money as alleged in count 1 and to use interstate facilities, and conspire to do so, to bribe John Rogers to influence the Board of Trustees of the Oklahoma Public Employees Retirement System. In short, he argues that he cannot be an extortionist, conspirator and briber together. There is, however, no logical inconsistency in the three roles. He is an actor in all three and not a victim. The court perceives no

reason or legal barrier to conclude that Hall could not attempt to extort money from Mooney and Taylor and attempt to bribe Rogers by offering to share with him the money he was to receive. Counts 1 through 4 are not mutually exclusive. Rule 8(a), Federal Rules of Criminal Procedure provides:

> "*Joinder of offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Since it appears that the offenses alleged against the defendant, David Hall, in counts 1, 2, 3 and 4 of the Indictment are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan" the court concludes that there is not an improper enjoinder of offenses.

If defendant's argument focuses solely on his role in count 2 as the receiver of a bribe and his co-conspirators as the givers of that bribe, and he relies on the principle that the giver and receiver of a bribe cannot be prosecuted for a conspiracy because the crime of bribery requires the participation of two parties, then his reliance is misplaced. In *United States* v. *Corallo,* 281 F.Supp. 24, 28 (S.D. N.Y. 1968) the defendants including both the givers and taker of a bribe were charged with conspiracy under 18 U.S.C. §371 to violate 18 U.S.C. §1952 to carry on the unlawful activity

of violating New York Bribery laws, and the court answered such argument in this manner:

> ". . . But this indictment does not charge a conspiracy to commit bribery but rather a conspiracy to violate Section 1952 in that, as part of the conspiracy, the alleged conspirators would travel and would use a facility of interstate commerce in furtherance of the bribe. There is an essential element of the offense here charged which would not be required in a charge of conspiracy to bribe, namely, the travel in interstate commerce or the use of a facility in interstate commerce to aid the unlawful activity."

Finally, if there were repugnancy among the counts, and the court does not agree that there is, this does not require a dismissal of the Indictment against the defendant. The technical charge of repugnancy applies to a contradiction between material allegations in a count. *Sunderland* v. *United States,* 19 F.2d 202 (CA8 1927); *United States* v. *Briggs,* 54 F.Supp. 731 (D. D.C. 1944). While such repugnancy may render a count bad, repugnancy between counts does not necessarily render an Indictment objectionable. There is no rule which forbids the joinder of offenses otherwise properly joined on the ground that they are inconsistent. See *United States* v. *Van Scoy,* 482 F.2d 347 (CA10 1973). In *People* v. *Anderson,* 242 P. 906 (Calif. 1926) the court sustained a two-count Indictment, the first for extortion and the other for bribery, over objection that the commission of one precluded and refuted any possibility of the commission of the other. It is within the power of the Grand Jury to indict a defendant for offenses which may seem "repugnant". *United States* v. *Valenti,* 74 F.Supp. 718 (W.D. Pa. 1947).

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As a further ground to dismiss counts 2, 3 and 4 the defendant states that:

> "Said indictment does not state a crime in counts II, III and IV because the facts alleged to support the bribery allegation do not state an offense under Section 381 or Section 382 of Title 21, Oklahoma Statutes, which in turn destroys the conspiracy charge under Section 371, Title 18 of the United States Code in Count II and the Travel Act charges under Section 1952 of Title 18 United States Code in Counts II, V, and VI of the indictment."

Essential to the validity of counts 2, 3 and 4 are adequate allegations of an intent to carry on any unlawful activity. Section 1952 of Title 18, United States Code defines "unlawful activity" so far as pertinent here, as "extortion, bribery or arson in violation of the laws of the State in which committed." In *United States* v. *Rizzo,* 418 F.2d 71, 74 (CA7 1969), cert. denied 397 U.S. 967 the court held:

> "The gravamen of the charge under Sections 371 and 1952 is the violation of federal law. As it relates to the substantive counts, the offense is the use of an interstate facility, with the intent to promote or further an unlawful activity in violation of state law, and the performance of some act designed to promote or further that illegal purpose. Reference to state law is necessary only to identify the type of unlawful activity in which the defendants intend to engage. It is not necessary to allege the elements of the state's substantive offense intended to be committed." Citations omitted.

The unlawful activity alleged in these counts is twofold: the bribery of John Rogers in violation of 21 O.S.

§381 and acceptance of a bribe by David Hall in violation of 21 O.S. §382. The defendant Hall's argument ignores the allegations concerning the bribery of Rogers and maintains that allegations concerning acceptance of a bribe by Hall are insufficient to show a violation of Oklahoma law for the reason that Hall was not a member of the Board of Trustees of the Oklahoma Public Employees Retirement System and the Taylor investment proposal would never come before him in his official capacity as required by 21 O.S. §382. Assuming arguendo the insufficiency of the allegations to establish the unlawful activity consisting of accepting a bribe, such defect is not fatal to the indictment. The allegations concerning the attempt to bribe Rogers are sufficient to establish the necessary unlawful activity. Pursuant to the scheme to bribe him it is alleged in Overt Act 3 of Count 2 that Hall offered him $25,000 to help Hall get the investment proposal from Taylor accepted by the Board of Trustees. John Rogers as Secretary of State was Chairman of that Board and the matter would come before him in his official capacity. The essential elements of a violation of 21 O.S. §381 are sufficiently covered by these allegations. Proof in support of these allegations concerning the attempted bribery of Rogers will establish the unlawful activity essential to conviction of conspiracy to violate 18 U.S.C. §1952 in count 2 and the substantive violation of the Travel Act in counts 3 and 4.

The validity of the Indictment is not affected by the fact that the pleader may have mistakenly stated the acts alleged to be a violation of both 21 O.S. §§381 and 382. *Prussian* v. *United States,* 282 U.S. 675 (1931). In *Ford* v. *United*

States, 273 U.S. 593 (1927) the defendants had been charged with conspiracy to commit offenses against the United States in violation of (1) the National Prohibition Act, (2) the Tariff Act and (3) The Treaty with Great Britain and in considering the attack upon the Indictment the court stated:

> "The validity of the indictment is attacked, first, because it charges that the conspiracy was to violate the treaty, although the treaty creates no offense against the law of the United States. This is true, but that part of the indictment is merely surplusage and may be rejected. *Bailey* v. *United States,* 5 F. (2d) 437; *Remus* v. *United States,* 291 Fed. 501; *United States* v. *Weiss,* 293 Fed. 992, 995; *United States* v. *Drawdy,* 288 Fed. 567, 570. The trial court took this view. But it is contended that this is to amend the indictment and comes within the inhibition of the principle of *Ex parte Bain,* 212 U.S. 1. That decision condemns the striking out of words from an indictment. The action here complained of is merely a judicial holding that a useless averment is innocuous and may be ignored." (Emphasis supplied)

In *United States* v. *Strauss,* 283 F.2d 155 (CA5 1960) the defendant was charged in a single count with conspiracy to violate both the Mail Fraud and the Bankruptcy Act. The court found the charge insufficient with regard to the Mail Fraud Statute but adequate as to the Bankruptcy Act. It then stated:

> "It is further clear that the failure of the indictment against appellee Strauss to charge adequately a violation of the Mail Fraud Statute is effective merely

> to eliminate that charge from the case; and so long as the remaining portions of the indictment adequately charge a crime, the presence of the surplusage will not justify dismissal of the entire indictment as it relates to appellee."

See also *Bary* v. *United States,* 292 F. 2d 53 (Tenth Cir. 1961).

Accordingly, having determined that there is no cause to dismiss any of counts 1, 2, 3 and 4 of the Indictment against the defendant, David Hall, his Motions to Dismiss will be denied.

IT IS SO ORDERED.

Dated this 11th day of February, 1975.

/s/ FRED DAUGHERTY

Fred Daugherty
UNITED STATES DISTRICT JUDGE

APPENDIX E

U. S. Constitution: Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution: Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Hobbs Act: Tit. 18 U.S.C. §1951

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or at-

tempts or conspires so to do, or commits or threaten physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Travel Act: Tit. 18 U.S.C. §1952

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which commited or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Appendix E

Rule 7: Federal Rules of Criminal Procedure

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The

indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) Criminal Forfeiture. When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are ont prejudiced.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Appendix E

Rule 43: Federal Rules of Criminal Procedure

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant,

may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

New York Penal Law of 1909

§850. Extortion defined

Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right. As amended L.1917, c. 518, eff. Sept. 1, 1917.

§851. What threats may constitute extortion

Fear, such as will constitute extortion, may be induced by an oral or written threat: 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family or to a corporatioan of which he shall be an officer, stockholder, employee or agent; or,

2. To accuse him, or any relative of his or any member of his family, of any crime; or,

3. To expose, or impute to him, or any of them, any deformity or disgrace; or,

4. To expose any secret affecting him or any of them; or,

5. To kidnap him or any relative of his or member of his family; or,

6. To injure his person or property or that of any relative of his or member of his family by the use of weapons or explosives. As amended L.1911, cc. 121, 602; L.1917, c. 518, eff. Sept. 1, 1917.

§852. Punishment of extortion

A person who extorts any money or other property from another, under circumstances not amounting to robbery, is punishable by imprisonment not exceeding fifteen years, if the same is done by means of force or a threat mentioned in section eight hundred and fifty or in either of the first four subdivisions of section eight hundred and fifty-one, and by imprisonment for not less than five years nor more than twenty years if the same is done by means of a threat mentioned in subdivisions five or six of the latter section. As amended L.1909, c. 368; L.1911, c. 602, eff. Sept. 1, 1911.

§853. Compulsion to execute instrument

The compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting or intended to affect any cause of action or defense or any property is an extortion of property within the last two sections.

Appendix E

§854. Extortion committed under color of official right

A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority:

1. Arrests another, or detains him against him will; or,

2. Seizes or levies upon another's property; or,

3. Dispossesses another of any lands or tenements; or,

4. Does any other act, whereby another person is injured in his person, property, or rights.

Commits oppression and is guilty of a misdemeanor.

§855. Public officer taking illegal fees commits extortion

A public officer who asks, or receives, or agrees to receive, a fee or other compensation for his official service:

1. In excess of the fee or compensation allowed to him by statute therefor; or,

2. Where no fee or compensation is allowed to him by statute therefor,

Commits extortion and is guilty of a misdemeanor.

§856. Blackmail

A person who, knowing the contents thereof, and with intent, by means thereof, to extort or gain any money or

other property, or to do, abet, or procure any illegal or wrongful act, sends, delivers, or in any manner causes to be forwarded or received, or makes and parts with for the purpose that there may be sent or delivered, any letter or writing, threatening:

1. To accuse any person of a crime; or,

2. To do any injury to any person or to any property; or,

3. To publish or connive at publishing any libel; or,

4. To expose or impute to any person any deformity or disgrace,

Is punishable by imprisonment for not more than fifteen years. As amended L.1909, c. 368, eff. Sept. 1, 1909.

§857. Attempts to extort money or property by oral threats

A person who, under circumstances not amounting to robbery, or an attempt at robbery, with intent to extort or gain any money or other property, orally makes such a threat as would be criminal under any of the foregoing sections of this article or of section five hundred and fifty-one, if made or communicated in writing, is guilty of a misdemeanor. The provisions of this section do not apply to matters governed by section eight hundred and fifty-one of this act. As amended L.1911, c. 121, eff. Sept. 1, 1911.

Appendix E

§858. Threat referring to act of third person

It is immaterial whether a threat, made as specified in the foregoing sections of this article, and in section five hundred and fifty-one, is of things to be done or omitted by the offender, or by any other person.

§859. Rule as to persons acting under threats

Where a crime is committed or participated in by two or more persons, and is committed, aided, or participated in by any one of them, only because, during the time of its commission, he is compelled to do, or to aid or participate in the act, by threats of another person engaged in the act or omission, and reasonable apprehension on his part of instant death or grievous bodily harm, in case he refuses, the threats and apprehension constitute duress, and excuse him.

APPENDIX F

Order of the Tenth Circuit Court of Appeals

[*Entered May 12, 1976*]

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCH TERM—May 12, 1976

Before

The Honorable Jean S. Breitenstein, Senior Judge
The Honorable Robert H. McWilliams and
The Honorable William E. Doyle, Circuit Judges

No. 75-1358

(D.C. No. CR-75-8)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DAVID HALL,
Defendant-Appellant.

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that David Hall, appellant, shall, within ten (10)

days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the Western District of Oklahoma in execution of the judgment and sentence imposed upon him.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

A true copy
Teste
HOWARD K. PHILLIPS
Clerk, U. S. Court of
Appeals, Tenth Circuit
By LINDA A. HALL
Deputy Clerk

IN THE

Supreme Court of the United States

October Term, 1975

No. 76-11

DAVID HALL,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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Of Counsel

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REPLY BRIEF FOR PETITIONER

Opinions Below

Since the filing of the petition, the opinion of the United States Court of Appeals for the Tenth Circuit, Hall Pet. 1a-35a, has been reported at 536 F.2d 313.

Argument

The government's brief in opposition to the Hall petition, No. 76-11, is, palpably, a barren exercise in gloss and obfuscation in each of the six points comprising its argument. Opp. Br. 3-8. Thus, point by point—

1. In its first point, Opp. Br. 3, 4, in answer to petitioner's second point, Hall Pet. 15-24, the government treats with the district court's gross tinkering with the substance of the indictment (which the court below sanctioned) in legal effect, to amend it by deletion; but not once in that compelling context does the government mention *Bain*,[1] as though this Court had never decided that case, nor expressly reaffirmed it in *Stirone*[2] and, again, in *Russell*.[3] Hall Pet. 19-24. Similarly, the government utterly ignores the existence of Rule 7(d), F.R.Crim.P., promulgated by this Court. Hall Pet. 21, 22. These decisions and rule are plainly applicable and governing here, and much as the government might wish to, it cannot make them "go away" by hiding its head in the sand. Nor does the government's silence lessen one whit what it would thereby gloss over, that in the presence of such decisions and rule, the district court's action was a patently impermissible violation of the petitioner Hall's Fifth Amendment right to be tried not otherwise than on an indictment by a grand jury. The government's tactic of silence cannot obscure the reality that the district court's action, and the affirmance by the

1. *Ex parte Bain*, 121 U.S. 1 (1887).

2. *Stirone* v. *United States*, 361 U.S. 212, 215, 216 (1960).

3. *Russell* v. *United States*, 369 U.S. 749, 770 (1962).

court below, fly in the face of Rule 7(d), and are in utter conflict with this Court's decision in *Bain*.

Curiously, the government argues, p. 4, that by its deletion "the trial court did no more than withdraw a charge from the jury's consideration, and it is not material whether it did so as a deletion of surplusage or because it did not believe that the charge would be sustained by the evidence." But, while the government perceives no material difference between the two alternatives it posits, in *Salinger*[4], Hall Pet. 22, 23, this Court held that there was a most material difference between the two. Furthermore, so far as concerns the second alternative, the trial court did its "deleting" before either the prosecution or the defense had made its opening statement to the jury. Hall Pet. 16. Accordingly, the trial court could have had no basis for believing whether or not the charge he deleted "would be sustained by the evidence". And, so far as concerns deleting the charge as "surplusage", *Bain*, and Rule 7(d), F.R.Crim.P., make it plain beyond all doubt, that such action can be taken, if at all, *only* on the defendant's motion. Hall Pet. 21, 22.

Equally curiously, the government urges, p. 4, in support of its position that the deletion from the indictment did not prejudice petitioner, that the "grand jury necessarily found that probable cause existed to warrant" inclusion in the indictment of both charges of violations of the Oklahoma statutes—the one the trial court left standing, as well as the one it deleted. If that be so, by what authority, one may ask, could the district court determine that one charge

4. *Salinger* v. *United States*, 272 U.S. 542, 548 (1926).

was surplusage and the other was not? In *Bain,* this Court held that there was no such authority. And, in *Bain* and *Stirone,* too, this Court gives the short answer to the government's argument that the deletion did not "prejudice" the petitioner. Hall Pet. 23, 24; 10, 20. *Cf.* Hall Pet. 16, 17.

In view of the force and clarity of *Bain, Stirone* and *Russell,* and the stern limitation of the first sentence of the Fifth Amendment, and of Rule 7(d) F.R.Crim.P., it is not surprising that the government chose not to tangle with them. But, having so chosen, it may respectfully be suggested that the appropriate course for the government to take, was, and still is, to confess error in this aspect of the case, and not to whistle in the dark, hopeful that the matter will be overlooked.

2. In its second point, Opp. Br. 4, 5, which is in answer to petitioner's first point, Hall Pet. 7-15, the government treats with the meaning to be ascribed to the phrase in Hobbs Act "under color of official right", wholly without adverting to the legislative history of the Act. Accordingly, the government utterly ignores the plain fact, shown by the legislative history, that the phrase was expressly taken, *with its meaning,* from New York legislation, where it had a fixed meaning, which was, in turn, derived from the prior common law. Hall Pet. 9-11; fn. 7, p. 15; 81a-85a. It is this meaning for which the petitioner Hall contends. Strangely, the government argues that to give the phrase as used in the Hobbs Act, the same meaning it had in the New York Penal Law from which it was taken, as the sponsors of the Act expressly intended, Hall Pet. 9, "would unjustifiably eviscerate the Act and create a loophole not intended by Congress." Opp. Br. 5. This is sheer *ipsi*

dixit, for which the government cites, and can cite, *no* support whatsoever in the legislative history of the Act. On the contrary, the legislative history is crystal clear that the Congress *understood* and *intended* that as used in the Hobbs Act, the phrase had, and would have the same meaning as it had in the New York legislation, and no other. Hall Pet. 9. The Congressional intent as authoritatively shown by the printed pages of the Congressional Record stands in sharp contrast with the Congressional intent as somehow divined by the government.

The government supports what the court below and other Courts of Appeals have done, Hall Pet. 12-14, Opp. Br. 5, that is, to expand the meaning of the phrase as used in the Hobbs Act, far beyond the meaning it had in the New York legislation. Hall Pet. 9-11. However, any such judicial expansion of the meaning of the phrase, is, necessarily, in head-on conflict with the salutary principle announced by this Court in *Morissette*[5]. Hall Pet. 12. The government deals with *Morissette* by not mentioning it, just as though it did not exist. But, this Court's decision in *Morissette,* no more than its decisions in *Bain, Stirone* and *Russell, supra,* pp. 2-4, is not so easily "swept under the rug".

3. In its third point, Opp. Br. 5, 6, in answer to petitioner's third point, Hall Pet. 24-40, the government treats with the matter of the drug-ingesting juror, Hall Pet. 24-40, shrugging it off by merely observing, Opp. Br. 6, that "[t]he district court found * * * that 'the juror was capable of rendering satisfactory jury service' ", that the court

5. *Morissette* v. *United States,* 342 U.S. 246 (1952).

of appeals "correctly sustained that finding", that there is "no reason for this Court further to review this factual issue."

But this is skimmed milk masquerading as cream. For, while the trial judge purported to make his finding on what the juror's doctor had told him, Hall Pet. 27, 29-30, it was actually based on the trial judge's own *ex cathedra* version of what was said in an *ex parte* telephone conversation between himself and the doctor, the essential content of which was disputed by the doctor, sworn as a witness. Hall Pet. 28, 29. And, the trial judge, in denying petitioner's renewed motion for a mistrial, nevertheless adhered to his prior decision, although he confessed that he had been unaware that the juror had taken valium, a tranquilizer, an hour and a half before she rejoined the jury in its deliberations pursuant to his direction. Hall Pet. 27, 30-34. The juror, herself, had no doubt that her ingestion of drugs had adversely affected her ability to serve. Hall Pet. 36; fn. 10, 36.

In the circumstances, the trial judge's finding that the juror was fit, was a bald abuse of his judicial function, and neither his action, nor its sanctioning by the court below, commends the government's conclusion, Opp. Br. 6, that there is no reason for this Court to review this issue.

4. In its fourth point, Opp. Br. 6, 7, in response to petitioner's fourth point, Hall Pet. 40-42, the government treats with the trial judge's engagement *ex parte* in a telephone conversation with the doctor of the hospitalized juror, and through him with the juror. Continuing to pursue its strategy of sidestepping the issues by silence,

the government nowhere considers such action by the trial judge in the light of Rule 43(a), F.R.Crim.P., Hall Pet. 40, 41, which it does not even mention. The government is content to adopt the conclusions of the court below. Opp. Br. 6. But these do not reach the nub of the matter—the *ex parte* character of the trial judge's communications with the juror's doctor and through him with the juror. Hall Pet. 39.

The proof of the pudding is in the eating, and not only did the judge and the doctor disagree as to what was said in a most material particular, Hall Pet. 28, 29, but in his earlier reporting of the conversation to counsel, the judge appears to have omitted another most material particular, if the doctor's recollection is correct. Hall Pet. 38. The trial of a criminal case should *not* involve disputes between the judge and a witness (for that, indeed, is what the doctor was) concerning what was said between them *ex parte*. The command of Rule 43(a) is clear, and neither the government nor the court below advanced any reason whatsoever why it could not and should not have been obeyed.

The government argues, Opp. Br. 6, 7, that in consequence of the hearing which followed (at petitioner's insistence) "any error related to the communication itself could not have affected the petitioner's substantial rights." But, the hearing merely served to bring the error to light, and to permit the plumbing of its depth. Hall Pet. 25-27. It did not serve to cure it. Nor did it serve to protect the petitioner from the consequential infringement of his substantial right to a fair trial. Hall Pet. 40.

5. In its fifth point, Opp. Br. 7, 8, in answer to petitioner's fifth point, Hall Pet. 42-49, the government treats with the district court's *voir dire* of prospective jurors.

Notwithstanding that the adverse pretrial publicity had reached every member of the panel examined, Opp. Br. 8; Hall Pet. 45, the government argues that the perfunctory questions put to the jurors on the *voir dire* were within the "sound discretion" of the district judge. Opp. Br. 7. But the court's questions were not of a kind calculated to invoke answers from which the court could itself objectively evaluate the juror's impartiality. Rather, they left to each juror the subjective assessment of his own impartiality. Hall Pet. 43, 44. Accordingly, on the very face of it, they were not the *searching* questions of which this Court speaks in *Nebraska Press Association* v. *Stuart*, —— U.S. ——, 96 S.Ct. 2791, 2805 (1976). The failure of the district court to propound such questions, which the court below sanctioned, was not an exercise of sound discretion, but rather an abuse of discretion. The court below itself recognized that in the circumstances of this case, it might have been "better practice" for the trial judge to have conducted the *voir dire* differently, Hall Pet. 44, but neither the court below nor the government ventures to suggest why the petitioner, whose liberty is at stake, can be denied the benefit of the "better practice".

6. In its sixth point, Opp. Br. 8-10, in response to petitioner's sixth point, Hall Pet. 49-54, the government treats with the prosecutor's unrestrained exploitation of the guilty plea of the co-defendant Mooney, who appeared as a prosecution witness. In its treatment of this matter, the government reduces almost to banality the virulence of the prosecutor's examination, cross-examination and summation. Opp. Br. 8, 9; Hall Pet. 50-54. And, in considering the trial judge's charge, the government seems once again to divine what the printed page does not show. Opp. Br. 9; fn. 5, p. 9; Hall Pet. 54. But in the face of the prosecutor's conduct, as the record shows it, Hall Pet. 50-54, the court's

charge, even as the government would reconstruct it, was manifestly too perfunctory and too general, by accepted standards, to convey to the jury the clear and incisive admonition the circumstances required. Hall Pet. 50.

Conclusion

The petition herein should be granted.

Respectfully submitted,

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Of Counsel

October 27, 1976*

* The petition herein was filed July 8, 1976. The government's brief in opposition to which this is petitioner's reply, was filed during the latter part of the afternoon of Friday, October 22, 1976. Monday, October 25, 1976, was Veterans' Day, and it was only during the morning of October 26, 1976, that petitioner's attorneys learned of the immediacy with which any reply thereto would have to be filed.